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Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

RUBY GOODE-HENRY, Individually and as Administratrix of the Estate of RACQUEL R. BURNETT, her daughter, deceased,

Petitioner,

v.

CITY OF PHILADELPHIA, OFFICER JAY BIGLE, Badge No. 1525 SGT. JODI SCHWARZL and LINDA LOCKWOOD, Administratrix of the Estate of JOSEPH ROSS,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE COMMONWEALTH COURT OF PENNSYLVANIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This petition arises from a civil rights action under 42 U.S.C. § 1983, brought in state court, on behalf of the estate of a young woman killed as the result of a police chase. The suit against the City of Philadelphia and the police officers orchestrating the chase concluded in favor of petitioner with a jury verdict against the officer in charge of the chase in the amount of $744,000. Following post-trial motions, the trial court entered a judgment *non obstante veredicto* (j.n.o.v.) in favor of the culpable defendant on the grounds that petitioner failed to meet the standard enunciated by the U.S. Supreme Court in *Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708 (1998). Petitioner appealed to the Pennsylvania Commonwealth Court, which affirmed the trial court's entry of *j.n.o.v.* Petitioner filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on December 17, 2002.

The questions presented are:

1. Whether the fundamental right of substantive due process guaranteed by the Fourteenth Amendment of the United States Constitution and the Civil Rights Act protected under 42 U.S.C. § 1983 requires state courts to examine the totality of circumstances involved in a police chase which results in the death of an innocent bystander in determining whether the police officers acted with "intent to harm".

2. Whether the state court in a civil rights action under 42 U.S.C. § 1983 was incorrect in applying the "intent to harm" standard enunciated in *Lewis* instead of the less onerous "deliberate indifference" standard when the police officers involved in the chase employed hours to deliberate the apprehension of the subject before undertaking a vehicular pursuit.

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Petitioner, Ruby Goode-Henry, Individually and as Administratrix of the Estate of Racquel R. Burnett, her daughter, Deceased, respectfully petitions for a writ of certiorari to review the judgment of the Commonwealth Court of Pennsylvania in this case.

OPINIONS BELOW

The opinion of the Commonwealth Court of Pennsylvania is published at 804 A.2d 1997 (2002). App. A. The opinion and orders of the Philadelphia Court of Common Pleas are unpublished. App. B. The order of the Supreme Court of Pennsylvania denying the Petition for Allowance of Appeal is published at 814 A.2d 679 (2002). App. C.

STATEMENT OF JURISDICTION

The order of the Pennsylvania Supreme Court denying permission to appeal was entered on December 17, 2002. This court's jurisdiction rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part that: "No State shall * * * deprive any person of life, liberty or property, without due process of law * * * " U.S. Const. Amend. XIV, § 1.

42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or

immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, * * *

STATEMENT OF THE CASE

A. Procedural History

This petition seeks to remedy Pennsylvania's misinterpretation of *Sacramento v. Lewis*, 523 U.S. 833 (1998), which has resulted in the infringement of Petitioner's guarantee of substantive due process under the Fourteenth Amendment to the United States Constitution and the violation of her civil rights in contravention of 42 U.S.C. § 1983.

Petitioner tried her case to a jury and a verdict was returned in her favor in the amount of $744,000. The jury determined that petitioner met its high burden of proof that the officer-defendant who orchestrated the police chase acted with "intent to harm". Following post-trial motions, the trial court entered *j.n.o.v.* in Respondent Schwarzl's favor, finding, despite the jury's verdict to the contrary, that petitioner failed to meet the burden established by the United States Supreme Court in *Lewis*. App. B. Petitioner appealed to the Commonwealth Court of Pennsylvania, which affirmed the trial court's decision. App. A. Petitioner, thereafter, filed a Petition for Allowance of Appeal to the Pennsylvania Supreme Court, which was denied on December 17, 2002. App. C.

The Pennsylvania Courts' failure to consider the totality of circumstances involved in the police chase and their disregard of the standard articulated in *Lewis* has deprived Petitioner of her constitutional right of substantive due process under Section 1 of the Fourteenth Amendment of the United States Constitution and has deprived Petitioner of her civil rights protected under 42 U.S.C. § 1983.

B. Statement of Facts

On January 12, 1998, Philadelphia Police Officer Jay Bigle received a routine radio call asking him to take a report regarding recovery of stolen property. While Officer Bigle was inside a residence on the 6600 block of Tulip Street in the City of Philadelphia, his personal briefcase was stolen from his marked patrol vehicle outside. Officer Bigle had left the car unlocked in violation of police department regulations. The briefcase did not contain important or confidential law enforcement information or material. Rather, it contained routine police report forms, "personal items" belonging to Office Bigle, and a blackjack that he carried on patrol. The briefcase and its contents did not have a value in excess of $2,000. Theft of such property is considered a misdemeanor and no different than theft of similarly valued non-police property. When Officer Bigle returned to his patrol car, he observed that in addition to the missing briefcase, the emergency dome lights on his patrol cruiser had been activated.

Bigle's first suspicion was that a fellow officer had played a prank on him, as apparently such conduct had taken place within the 15th Police District on prior occasions. From the time the theft was discovered at approximately 4:45 p.m., until the accident on Interstate 95 at 9:30 that night, Officer Bigle answered only one (1) other radio call. The remainder of the time he spent in canvassing other officers to determine if they had taken the briefcase, or in searching for Joseph Ross, the 16 year old boy whom police shortly learned had stolen it.

Lt. Jodi Schwarzl[1] was Officer Bigle's supervisor on the night in question. When she learned that the briefcase had been stolen, Lt. Schwarzl became actively involved in investigating the theft. Lt. Schwarzl instructed Officer Bigle to accompany her back to the neighborhood where the theft had occurred,

1. Lt. Schwarzl was a Sergeant on January 12, 1998, but she has since been promoted to Lieutenant.

where the two participated in a house-to-house investigation in an attempt to learn the identity of the individual who had stolen the briefcase. Lt. Schwarzl quickly learned that a teenage boy named Joe, accompanied by a girl, had taken the briefcase from the cruiser and left the area in a dark pickup truck. Shortly thereafter, the perpetrator was more precisely identified as Joseph Ross, a 16-year-old boy. Lt. Schwarzl testified that the theft of the briefcase as a crime had been solved within 15 minutes of the commencement of the investigation.

Lt. Schwarzl was likewise able to identify the passenger in the truck as Jennifer DePew, a 16-year-old girl, and located the drugstore where Jennifer worked. Lt. Schwarzl sent a patrol car there in an attempt to intercept her. The police also learned the phone number to either or both of Jennifer's and Joseph Ross' pagers. Thereafter, Lt. Schwarzl went to Jennifer DePew's home, told Diane DePew, Jennifer's mother, the situation and requested her mother to page her daughter. Lt. Schwarzl could hear DePew berating Ross in the background during their phone conversation because the police were now looking for them. While in the presence of Jennifer's mother, Lt. Schwarzl actually spoke with Jennifer, arranged a location where Jennifer was to be dropped off by Ross and was assured that the police would wait until she had left the vehicle before they would attempt to apprehend Ross and recover the briefcase.

Lt. Schwarzl also learned from Diane DePew that Joseph Ross, the driver of the pickup truck and suspect in the theft, would likely flee from the police. Despite knowing the identities of DePew and Ross, Lt. Schwarzl directed her officers to take various positions in the neighborhood in order to observe the "dropoff" of Jennifer DePew. Lt. Schwarzl also advised her subordinates that Jennifer and Joseph Ross had the briefcase and that it was important to apprehend them.

Before the vehicular pursuit of the suspect began, Lt. Schwarzl, as supervisor, had personally directed no fewer than seven (7) police vehicles, excluding herself and Officer Bigle, to search for the briefcase and/or intercept Jennifer DePew.

Before the Ross vehicle made it to the dropoff point of Richmond and Lefevre, Officer Malinka Bragg, one of the officers under the command of Lt. Schwarzl, located and tracked the movement of Ross' vehicle, then flashed her lights at him, and thereafter attempted to stop the Ross vehicle. Officer Bragg believed the driving maneuvers she observed Ross make were "dangerous". The other police officers involved then joined in a low-speed pursuit. Lt. Schwarzl monitored the other officers over police radio and also joined the pursuit on Richmond Avenue and followed the Ross vehicle onto the Betsy Ross Bridge. The pursuing officers, including Lt. Schwarzl, chased Ross onto the approach of the Betsy Ross Bridge, where he paused momentarily, and then made an illegal u-turn against traffic proceeding back toward Pennsylvania. The officers continued in low-speed pursuit, following Ross to the off-ramp for I-95 South. Ross thereafter entered the off- ramp for I-95 southbound with three (3) police cars in close proximity: one directly behind, and two overtaking Ross from either side. Civilian eyewitness Steven Richardson testified that the police were attempting to block Ross from entering the interstate. Near the end of the ramp, a collision occurred between Officer Bigle's police cruiser and Ross' truck, turning the truck perpendicular to the southbound lanes of traffic. At that point, Ross headed northbound in the southbound emergency lane, against the flow of traffic.

Police radio then instructed any available units to proceed in the northbound lanes in an attempt to continue the pursuit of Ross. Additionally, Sgt. Michael Houck ordered an officer to the north, Christopher Morton, to proceed southbound in the far right hand lane, with his emergency lights flashing.

Lt. Woertz, Schwarzl's commander, was never apprised by Schwarzl that the suspect was a minor, that a pager number for the suspect was known and available, that the suspect would flee if he saw the police, that police had actually spoken with the passenger in the suspect's vehicle and had arranged for the passenger to be dropped off, all of which were factors to be weighed in determining if pursuit was appropriate under Police Department regulations and Directive 45 concerning police chases. Officer Morton's southbound movement on I-95 was observed by civilian witness Steven Richardson, who was paralleling Ross' path of travel in the northbound lanes. As Officer Morton's emergency lights became visible to Mr. Richardson, he observed Joseph Ross veer across the southbound lanes, away from Morton's approaching cruiser, resulting in the head-on collision with the car in which Racquel Burnett was a passenger.

The Ross truck if left unobstructed in the shoulder lane could have exited I-95 without collision of any kind. The Princeton (Cottman Avenue) ramp was the first exit physically compatible and probable place of exit for the fleeing Ross vehicle. Directive 45 does not permit sending a police vehicle in the opposite direction from a fleeing suspect who is himself going against traffic.

As a result of the collision between the Ross vehicle and the vehicle in which Burnett was a passenger, 23-year-old Racquel Burnett, along with Ross and DePew, were killed.

C. Commonwealth Court of Pennsylvania's Analysis

The Commonwealth Court of Pennsylvania did not consider the totality of events which led ultimately to the collision that killed Petitioner. As the trial court beneath it did, the Commonwealth Court examined this police "chase" only from the moment a police officer actually visualized the Ross vehicle

up to the fatal collision, a total of approximately six (6) minutes. The Commonwealth Court ignored all that had transpired in the nearly five (5) hour period immediately preceding the final "chase". In specifically rejecting Petitioner's argument that the Court should consider the entire period from 4:45 p.m. through 9:32 p.m., the Commonwealth Court incorrectly stated, "[b]y merging the investigation phase with the apprehension phase of a criminal case that ended in a police pursuit, any such police pursuit could be measured against the standard of deliberate indifference. This approach is directly at odds with the holding in *Lewis*." App. A at p. 14a.

To the contrary, it is the Commonwealth Court's analysis that is at odds with *Lewis*. By failing to analyze the specific totality of facts of the instant case, the Pennsylvania Courts have failed to abide by *Lewis* and have deprived Petitioner of her fundamental right of substantive due process and of her civil rights.

Specifically, *Lewis* stated:

> Rules of due process are not, however, subject to mechanical application in unfamiliar territory. Deliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands *an exact analysis of circumstances* before any abuse of power is condemned as conscience shocking.

523 U.S. at 850, 118 S. Ct. at 1718 - 1719 (emphasis supplied).

The Pennsylvania Courts have failed to engage in an "exact analysis of circumstances" as described in *Lewis*, choosing instead to usurp the jury's verdict and focus on the final six (6) minutes of a "chase" that, in actuality, lasted much longer.

In doing so, Petitioner suffered a violation of her civil rights and has been deprived of her Fourteenth Amendment guarantee of substantive due process.

REASONS FOR GRANTING THE WRIT

I. Review Is Warranted Because the State Court Failed to Consider the Totality of Circumstances Involved in the Police Chase, Thereby Depriving Petitioner of Her Right of Substantive Due Process under the Fourteenth Amendment and of Her Civil Rights Protected by 42 U.S.C. § 1983.

The jury sitting on this case was asked the following question:

"Question Three: Did Lieutenant Schwarzl violate the civil rights act in that her conduct constituted an intent to harm unrelated to the legitimate object of the arrest?" The unanimous twelve-person jury answered that question: "Yes." App. D. While the jury rendered its verdict based on its thoughtful consideration of a totality of the circumstances involved with this chase, Pennsylvania Courts chose to ignore all of the facts surrounding this chase save the last six (6) minutes.

Despite properly allowing the jury to consider all proffered evidence of the antecedent events that led to the decision to undertake and continue a vehicular pursuit in order to determine whether an "intent to harm" existed, both the trial court and the Commonwealth Court held that all evidence of events preceding the actual vehicular chase – six minutes in length from the time dome lights and siren went on until the suspect's vehicle was struck and re-directed on the highway – was *irrelevant* and could not support the jury's verdict as a matter of law. In doing so, Pennsylvania Courts have deprived Petitioner of her civil and constitutional rights. Accordingly, this Honorable Court should review this matter to correct the Pennsylvania Courts' misinterpretation and misapplication of *Sacramento v. Lewis*. In failing to consider all of the facts surrounding this police

chase, Pennsylvania has interpreted *Lewis* as setting an impossible burden of proof and has thus rendered illusory the civil rights protection under § 1983 and the fundamental right of substantive due process. This Honorable Court in *Lewis* declined to immunize all police conduct in pursuits, a rule effectively created by the Pennsylvania Courts.

There was an abundance of evidence upon which this jury did find an "intent to harm" as charged by the trial court. This higher standard requiring "intent" necessarily contemplates an analysis of all of the facts in the case, not the certain time period selected by the court.

The United States Supreme Court in *Lewis* created a high constitutional standard where police are reacting under the pressure of duty and are making split-second judgments in discharging those duties. Federal cases decided after *Lewis* admittedly show great reluctance to second guess police when they are acting in good faith in response to the exigencies of a situation. The fact that no such emergency was present here and no exigencies excused the opportunity to deliberate, reflect and formulate an entirely different plan to apprehend this suspect without a perilous vehicular chase and the attendant public safety risk was a fact that the Pennsylvania Courts should have considered in evaluating this case.

The courts must consider a totality of factors in examining a case under *Lewis*. The facts that police had identified the suspect, knew where the suspect was, had spoken with a person travelling with the suspect and knew the suspect's home address, and that said suspect had allegedly committed a misdemeanor theft, must be considered as part of the analysis under *Sacramento v. Lewis*.

As discussed earlier, In making a determination as to whether certain conduct "shocks the conscience," *Lewis*

specifically recognizes that an "exact analysis" is required. Circuit Courts have long wrestled with the proof required to show intent.

In *Davis v. Twp. of Hillside*, 190 F.3d 167 (3d Cir. 1999), Judge McKee offered a concurring opinion that emphasized that "there often is no way to establish objective intent other than by the reasonable fact-finder's common sense evaluation of the circumstances." 190 F.3d at 174. Judge McKee then went on to cite a variety of federal cases relying upon circumstantial evidence to establish intent in cases alleging constitutional violations. In particular, he cited *Parkway Garage, Inc. v. City of Phila.*, 5 F.3d 685 (3d Cir. 1993), in which the Court of Appeals held that circumstantial evidence is "often the best and most reliable proof of the subjective motivations for the conduct of the actors." 190 F.3d at 174. In the present case, police had detailed and specific information regarding the identity of the suspect, the identification of someone in his company, where the suspect lived, where he was going and where he was going to drop off his passenger. The evidence reveals that the suspect was aware that the police were looking for him and police had learned the suspect was a risk to flee and was only 16 years old. Police possessed this information hours prior to the car "chase".

When the police officers dispatched to the corner where the suspect was supposed to drop off his passenger made eye contact with the suspect's vehicle, a low speed chase ensued. Unlike *Lewis* and all Circuit Court cases applying the *Lewis* standard, the "chase" in the present case did not involve high speeds. This situation is unlike *Lewis* and its progeny where a sudden, high-speed chase ensued requiring immediate police action and affording no time for deliberation.

The Circuit Courts discussing *Lewis* recognize a need for analysis of the facts specific to each individual case. For example, in *Brown v. Commonwealth of Pennsylvania,*

et al., 2003 WL 148919 (3d Cir. Jan. 22, 2003), the Third Circuit held, after analyzing *Lewis*, *Miller v. City of Philadelphia*, 174 F.3d 368 (3d Cir. 1999), and *Ziccardi v. City of Philadelphia*, 288 F.3d 57 (3d Cir. 2002) that "[w]e derive from these cases that the 'shocks the conscience' standard should apply in all substantive due process cases *if the state actor had to act with urgency*." *Id.* at p.5. (emphasis supplied.) Given the qualification regarding the need for the state actor to act "with urgency" in order for the "shocks the conscience" standard to apply, it is obvious that the court must consider the entire circumstances surrounding the subject action in order to perform the correct analysis under *Lewis*.

Likewise, in *Cummings v. McIntire*, 271 F.3d 341 (1st Cir. 2001), the court cites the "exact analysis of circumstances" requirement from *Lewis*. *Id.* at 345. In this case, a police officer directing traffic shoved a pedestrian asking directions to the ground causing injury. The court commented that the facts of this case fell into the middle ground of the extremes addressed in *Lewis*, "neither so tense and rapidly evolving as a high-speed police pursuit nor so unhurried and predictable as the ordinary custodial situation." *Id.* For these cases, the court went onto state, there are a variety of factors which the court must consider. The court considered the following test formulated in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973).

> In determining whether the constitutional line has been crossed, a court must look to such factors as the need for the application of force, the relationship between the need and the amount of force that was used, the extent of injury inflicted, and whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm.

See, e.g., *Neal v. Fulton County Bd. of Educ.*, 229 F.3d 1069, 1076 (11th Cir. 2000); *Petta v. Rivera*, 143 F.3d 895, 902

(5th Cir. 1998); *Thomson v. Olson*, 798 F.2d 552, 558-59 (1st Cir. 1986).

Although *Cummings* did not involve a police chase, it did analyze the requirements of *Lewis* in a substantive due process claim. The court concluded, as it should, that an analysis of the totality of the circumstances is necessary, particularly in cases that do not fit squarely with the facts of *Lewis*. In evaluating substantive due process protections and civil rights guarantees, the courts must consider all facts relevant to the actions of the police officer.

As was the case in *Cummings*, the facts in the present case are very different than the facts in *Lewis*. In order to apply the "shocks the conscience" standard under these circumstances, the court is duty bound to consider all the facts that occurred in this case, from 4:45 p.m. until the time of the tragic collision, not, as Pennsylvania Courts admittedly did, the final six (6) minutes of that time period.

In charging the jury, the Trial Court stressed that:

> Once again, the standard here is – and it's laid out in the questionnaire – was there intent to harm unrelated to the legitimate object of the arrest or to worsen the legal plight of Joseph Ross.

The Trial Court thus made clear in its instructions precisely what the Supreme Court in *Lewis* set out in defining the conscience-shocking standard, to wit: intent to harm or worsen the legal plight of a suspect, 118 S. Ct. at 1720, and not to "induce [the suspect's] lawlessness, or to terrorize, cause harm or kill." 118 S. Ct. at 1721. The jury, following the court's instructions, correctly analyzed all of the facts and found that Lt. Schwarzl acted with "intent." The Pennsylvania Court, in granting and affirming *j.n.o.v.*, turned the *Lewis* standard on its head and created a standard that can never be satisfied.

In order to determine whether there was an intent to harm unrelated to the legitimate object of the arrest, to terrorize Joseph Ross or to cause him physical injury or harm, the jury needed to hear and understand *all* of the facts and circumstances leading up to the decision to undertake a police chase under the totality of the circumstances which presented themselves on January 12, 1998. Indeed, the vast majority of the evidence received during the two week trial of this case concerned the police activities in the hours leading up to the decision to undertake a vehicular pursuit and the tragedy which unfolded thereafter. The jury needed to understand the motive for the police decision to undertake a chase under the facts and circumstances which were presented in order to evaluate whether an "intent to harm" existed.

Despite properly allowing the jury to consider all proffered evidence of the antecedent events that led to the decision to undertake and continue a vehicular pursuit in order to determine whether an intent to harm existed, the trial court in considering whether to overturn the jury's verdict elected to ignore *all* evidence of events preceding the actual vehicular chase. In short, the court chose to review only limited facts, improperly condensing the entire analysis to the events of the physical chase alone, from the point lights and sirens were initiated until the words "terminate" were first uttered over police radio. The trial court below wrote:

> This case must be viewed and analyzed solely from the standpoint of the chase. It is the chase itself which is important in determining intent to harm, rather than the cause of the chase. The fact that the police had been looking for Ross is not crucial. It is what occurred after Ross sited Officer Bragg and decided to flee. At that point in time, Officer Bragg and subsequently other police had to act quickly without time to reflect. It is the time period beginning with the chase and ending with the accident, which is the

> only relevant aspect to the analysis. What difference does it make what the antecedent facts were which engendered the pursuit?

App. B at p. 46a.

As addressed earlier, the Commonwealth Court of Pennsylvania accepted this line of reasoning. Looking at the "antecedent facts" which engendered the pursuit in this case is the *only* way in which intent to harm can be understood.

What "shocks the conscience" depends upon the circumstances. *Miller v. City of Philadelphia*, 174 F.3d 368, 375 (3d Cir. 1999). "Intent to harm or [d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and the circumstances of each case are critical." 118 S. Ct. at 1718; *see also Roberson v. City of Philadelphia*, 2001 WL 210294 (E.D. Pa. March 1, 2001). By refusing to consider the context and circumstances under which this particular vehicular chase arose, no purpose or motive of any kind can be gleaned for undertaking the pursuit and therefore "intent" of any kind cannot be ascertained. Thus sanitized to the several minutes in which the police vehicles followed the suspect's vehicle, one would never know that the fleeing suspect in this case was a 16 year old boy who stole a police officer's briefcase from his car in a prank, that the suspect's identity had been ascertained before the chase began, that the boy was fearful and known to likely flee if confronted by police and, once the chase began, that the police struck the boy's vehicle even after the chase appeared "terminated" thus redirecting the vehicle on the highway which soon after resulted in this fatal head-on collision. In short, by fairly considering all of the evidence leading up to and including the entire police chase, the jury could see that the police conduct was improperly motivated and lacked any legitimate law enforcement objective.

Importantly, these factual distinctions between *Lewis* and the present case must be considered in evaluating whether the Pennsylvania Courts erred by ignoring the antecedent facts. The police officers in *Lewis* did not know the identity of the motorcycle rider or his passenger. The officer in the present case knew the identity of both the driver of the truck, Joseph Ross, and his passenger, Jennifer DePew. The police officers in *Lewis* did not know where the fleeing suspects lived. The officers in the present case did, and, in fact, the police officer had been to DePew's home and spoken with DePew's mother. Police had DePew's mother page her. Lewis involved a high-speed police chase. The chase in the present case was low speed.

In *Lewis*, the police had not been in contact with the fleeing suspects. In the present case, police had DePew's mother page her, Lt. Schwarzl spoke with Jennifer and had arranged a location where DePew was supposed to be dropped off.

Obviously the suddenness, the speed, the need for instant decisive action and the lack of knowledge as to identity of the suspects in *Lewis*, warranted the ensuing chase and warranted application of the "shocks the conscience" standard enunciated in *Lewis*. Equally obvious is that none of those factors existed in the present case. Even assuming the "shocks the conscience" standard still applies to the present case, the court must consider the totality of circumstances in evaluating the case. When the twelve-person jury was entitled to review all of the facts involved in this case, it reasonably concluded that Lt. Schwarzl acted with an "intent to harm" and met the heightened standard enunciated in *Lewis*. In precluding *any* consideration of the antecedent facts leading up to the formal commencement of the vehicular pursuit, the Pennsylvania Courts have turned on its head the clear requirement in *Lewis* to make an "exact analysis of circumstances" or consider whether the police had an opportunity to deliberate so as to trigger a different, lowered standard in reviewing the conduct in the context of constitutional

constraints. In doing so, Pennsylvania Courts have deprived Petitioner of her civil and constitutional rights.

II. Review is Warranted Because a Substantial Federal Question Exists as to Whether the State Court Applied the Correct Standard under *Sacramento v. Lewis.*

Although there was an abundance of evidence upon which this jury found an "intent to harm," the highest standard of "intent to harm" should not have applied under the facts of this case given the obvious opportunity for reflection and deliberation that the police enjoyed and following the passage of significant time when police should have determined that a vehicular pursuit of *any* kind was unwarranted and unsafe. The Pennsylvania Courts have abrogated any distinction between cases in which there exists an opportunity for actual deliberation, like the present one, and cases where there is no time for actual deliberation, like *Lewis*. This Honorable Court must revisit *Lewis* in order to clarify that police have not been immunized as a result of *Lewis* and that where there is time for deliberation, the "deliberate indifference" standard applies.

In overturning the judgment of the jury in this case which unanimously found a civil rights violation by applying the more stringent standard as the Trial Judge charged, the Pennsylvania Courts turned to a host of cases decided under the Fourteenth Amendment, in which the courts have hesitated to find a constitutional violation, where police are reacting under the pressures of duty, and are making split-second judgments in discharging those duties. These cases show great reluctance to second guess police when they are acting in good faith in response to the exigencies of a situation. None of the cases relied upon by the court begin to approach the circumstances of this case as revealed by the evidence presented to this jury. In analyzing the due process violation, the importance of the facts of the case cannot be overstated because, as the Supreme Court recognized in *Lewis*, "our concern with

preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscious-shocking . . . Asserted denial is to be tested by an appraisal of the totality of the facts of a given case." *Id.*

Reduced to its essentials, this case is about misuse of police power under the totality of the circumstances and not simply about a vehicular "pursuit" which began, as discussed above, with the first sounds of police sirens and lights and ending with the word "terminate" over police radio. This myopic view of the facts fails to recognize the high degree of danger involved in pursuit, conceded by the City of Philadelphia in Directive 45, the heavy price paid by innocent civilians, and general recognition in the law enforcement community about the need to restrain the initiation and maintenance of pursuit under facts such as those presented here. As the supervisor of the police conduct witnessed on January 12, 1998 which led to the catastrophe that underlies this lawsuit, the conduct of Lt. Schwarzl in choosing to first employ the tactic of pursuit, and then by allowing it to continue under the facts of this case, was shocking. As stated previously, the suspect was a frightened 16 year old boy who had committed a misdemeanor. While not excusing any of his conduct on the date in question, he presented no threat to the public, and could have been arrested at any time. Indeed, unlike all of the pursuit cases decided by the Circuits, there was no emergency here until the police created one, and no danger to the public until the police misused their authority.

In *Lewis*, the Supreme Court limited the scope of civil rights liability for police conducting high-speed pursuits. *Lewis* arose out of a fatal accident in which police officers witnessed a motorcycle violating traffic laws, and unsuccessfully attempted to stop the cycle, after which a high speed pursuit followed. The Supreme Court began its analysis by observing that the due process clause of the Fourteenth Amendment is "intended

to prevent governmental officials from abusing [their] power, or employing it as an instrument of oppression." 118 S. Ct. at 1713. The Court further stated that rules of due process are not "subject to mechanical application", but must be tailored to the specific circumstances of the case. It went on to hold that a police officer may be held liable for pursuit only if his conduct "shocks the conscience" of the Court, and concluded that in cases "where unforseen circumstances demand an officer's instant judgment," liability will not be imposed absent "an intent to harm suspects physically or to worsen their legal plight." 118 S. Ct. at 1720.

In reaching this result, the Court carefully distinguished circumstances where governmental officials have the opportunity to engage in actual deliberation before choosing a course of action. Specifically, the Court discussed by way of analogy the obligations of prison officials, noting that in ordinary custodial situations, prison guards are obligated to exercise foresight in caring for prisoners. Under such circumstances, the Court observed that: "Deliberate indifference to inmate welfare rests upon the luxury enjoyed by prison officials of having time to make unhurried judgments, upon the chance for repeated reflection, largely uncomplicated by the polls of competing obligations." *Id.* In contrast, when facing a riot, prison officials are in a situation "calling for fast action," and must make decisions "in haste, under pressure, and frequently without the luxury of a second chance." 118 S. Ct. at 1720.

Applying that test to the facts in *Lewis*, the Court observed that the police officer in question was faced with a course of lawless behavior for which the police were not to blame, and that they had done "nothing to cause [the suspect's] high speed driving in the first place." It went on to note that the motorcyclist's conduct, witnessed by the police officer, presented a threat to the public as he proceeded "at breakneck speed forcing other drivers out of their travel lanes."

Finally, the Court pointed out that the suspect's behavior "was practically instantaneous and so was the [officer's] instinctive response." 118 S. Ct. at 1721.

Significantly, the Supreme Court cited with approval an earlier case, *Checki v. Webb*, 785 F.2d 534, 538 (5th Cir. 1986), in which the 5th Circuit held that civil rights liability is appropriate as a result of "a police officer's intentional misuse of his vehicle." 118 S. Ct. at 1720, n.13.

The rule set forth in *Lewis* simply does not apply when officers, with ample time for actual deliberation, set out in violation of department policy to settle a personal score or otherwise act in a manner unrelated to the legitimate object of an arrest. Decisions from various circuit courts confirm that the applicability of *Lewis* depends upon the facts of the case. In *Schaefer v. Goch*, 153 F.3d 793 (7th Cir. 1998), the Court held that the *Lewis* standard should apply in cases where it is necessary for officers to "make rapid, spur of the moment decisions." 153 F.3d at 797. It went on to state that limiting liability is appropriate when police officers "face a set of unforseen and rapidly changing circumstances that demand unreflective decisions with potentially grave consequences on every side." 153 F.3d at 798. *See also Brown, supra* (3d Cir. 2003).

In *Radecki v. Barela*, 146 F.3d 1227 (10th Cir. 1998), the Court held that *Lewis* recognized different categories of cases arising out of police conduct, such that, "in assessing the constitutionality of law enforcement actions, *we now distinguish between emergency actions and actions taken after opportunity for reflection.*" 146 F.3d at 1231 (emphasis added). The court went on to hold that when a police officer has the opportunity "to truly deliberate about the decision he or she is making, something less than unjustifiable intent to harm, such as calculated indifference, may suffice to shock the conscience." *Id.* at 1232.

In *Medeiros v. O'Connell*, 150 F.3d 164 (2d Cir. 1998), a case arising out of a failed attempt by police to rescue a hostage, the court observed that *Lewis* is applicable where "the officers instinct was to do his job as a law enforcement officer, *not to induce lawlessness, or to terrorize*." (Emphasis supplied.) 150 F.3d at 170.

In *Khan v. Gallitano*, 180 F.3d 829 (7th Cir. 1999), the court distinguished *Lewis* and held that the fundamental rights analysis of *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) still applies in circumstances unlike *Lewis*. *Id.* at 836. *Khan* involved an attorney's claim that certain officials wrongfully interfered with an existing contract. Although the factual scenario in that case differs greatly from both *Lewis* and the present case, the court recognizes that different analysis is required under different circumstances. In discussing *Lewis*, *Khan* emphasized that "[t]he circumstances in *Lewis*, a high-speed chase where government officials had to make split-second decisions, has no resemblance to the situation in this case." *Id. Khan*, as *Brown* and other courts considering *Lewis* have repeatedly stated, it is the "high speed" nature of the chase, the need for "split-second decision making" and acts with "urgency" that invoke the "shocks the conscience" test.

Courts have long recognized that conscious-shocking behavior under § 1983 will always depend upon the circumstances. In *Hawkins v. Freeman*, 195 F.3d 732 (4th Cir. 1999), the court stated that the "shocks the conscience" test "though long and frequently used since its first application to a "substantive due process" challenge to executive conduct in *Rochin v. California*, 342 U.S. 165, 72 S. Ct. 205, 96 L. Ed. 1983 (1952), remains an admittedly imprecise one in formulation. *Id.* at 741. In *Leddy v. Twp. of Lower Merion*, 114 F. Supp. 2d 372 (E.D. Pa. 2000), the court properly observed that because "context is important, whether an official's actions shock the conscious is analyzed along a 'culpability spectrum'." 114 F. Supp. at 375, citing with approval *Lewis*, at 849,

118 S. Ct. 1708, 118 S. Ct. at 1718. While ordinary negligence is "categorically beneath the threshold", *id.*, and will never qualify as conscious-shocking, 114 F. Supp. at 375, the spectrum begins above that level, and in "some circumstances conduct that is deliberately indifferent will shock the conscious." *Leddy*, *supra*, at 375 citing *Nicini v. Morra*, 212 F.3d 798 (3d Cir. 2000) (*en banc*).

Leddy involved a motorist injured in a collision with a police vehicle not involving a pursuit but nonetheless requiring an analysis of § 1983 and determining whether the officer's actions shocked the conscience along a "culpability spectrum". The district court concluded, after carefully looking at the circumstances of the particular case and whether the officer had an opportunity to deliberate or was called upon to make a spontaneous judgment, that the circumstances of that case fell somewhere between the parameters of deliberation and spontaneity. Thus, the *Leddy* court concluded, the officer's conduct may well have been negligent and conceivably reckless, but could not be characterized as constitutionally conscience-shocking. *Leddy*, *supra*, at 376.

Similarly, the Third Circuit in *Miller*, applied the analysis of *Lewis* in a substantive due process case that did not involve a police chase. In *Miller*, a mother, her children and their attorney sued the City of Philadelphia as the result of an emergency *ex parte* child custody hearing which resulted in the allegedly improper removal of the mother's two children from her custody. *See id.* at 370-71. Following *Lewis*, the *Miller* court, like the court in *Leddy*, viewed the state actor's actions contextually. The *Miller* court, citing *Lewis*, explained that "[t]o generate liability, executive action must be so ill-conceived or malicious that it 'shocks the conscience.'" *Id.* at 375 (quoting *Lewis*, 118 Supreme Court at 1717). *Miller* also held that "[t]he exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." *Id.* *See also Cannon v. City of Philadelphia*, 86 F. Supp. 2d 460,

470 (E.D. Pa. 2000) ("in evaluation whether [an] officer's actions shock the conscience, the [judge] must analyze whether the officers . . . were acting in a pressurized situation, inhibiting their ability to act in a deliberate fashion.")

In all of these cases, police were reacting spontaneously to genuine emergencies that law enforcement had no hand in creating. In this case, no such emergency existed. Whether police chose to pursue Ross for having committed a misdemeanor theft against a member of the Philadelphia police force, there was ample time for actual deliberation regarding the best way to apprehend the criminal. In fact pursuit was initiated and maintained in direct violation of departmental policies, with express knowledge that the suspect would flee and not stop for police. Such conduct on the part of Lt. Schwarzl as supervising officer suffices to show deliberate indifference to the rights of the victims of this police-caused catastrophe, as well as to shock the conscience of the Court.

This Honorable Court must address the substantial federal question of when the "deliberate indifference" standard applies to police action. In the absence of this much needed clarification, courts have been automatically reverting to the "shocks the conscience" standard and have failed to perform an "exact analysis" of the "totality of facts." The courts have created a *per se* rule that "actual deliberation" is impossible in any police chase situation. This flies in the face of *Lewis*.

This issue has been crystallized by the Eighth Circuit in two cases, *Feist v. Simonson*, 222 F.3d 455 (8th Cir. 2000) and *Helseth v. Burch*, 258 F.3d 867 (8th Cir. 2001). In *Feist*, the court held that, because the defendant police officer had an opportunity for deliberation, the district court correctly applied the "deliberate indifference" standard to the police officer's actions. *Id.* at 462. The court recognized that *Lewis* required that each case be evaluated based on its specific facts. In *Feist*, a six-mile chase taking approximately six (6) minutes was

involved. Both officer and suspect proceeded at high speeds and for 1.2 miles of the chase, both were travelling in the wrong direction on an interstate. The suspect was suspected of the "low-level felony of unauthorized use of a motor vehicle." *Id.* at 464. The court took all factors surrounding the chase into account and emphasized that, during the six (6) minutes involved, "the chase graduated from one requiring heated responses to one allowing conscious deliberation." *Id.* As a result of this opportunity to deliberate, the court employed the "deliberate indifference" standard.

In *Helseth*, the Eighth Circuit expressly overruled *Feist*. 258 F.3d at 869, 871. The basis for this decision was the majority's opinion that "*Lewis* plainly stated that the intent-to-harm standard, rather that the deliberate indifference standard, applies to *all* high-speed police pursuits aimed at apprehending suspected offenders." *Id.* at 871. (emphasis in original.)

A dissenting opinion authored by Circuit Judge McMillan in *Helseth* pointedly addresses the majority's misinterpretation of *Lewis*, which this Petitioner argues the Pennsylvania Courts have likewise done in the present case. Judge McMillan expressly disagreed with the majority's opinion that *Lewis* adopted a per se rule that the intent-to-harm standard applies to all police pursuit cases. *Id.* at 873. The dissent specifically underscores the point Petitioner in the instant case raises as a substantial federal question. In misapplying *Lewis*, Judge McMillan writes:

> . . . but I write separately to explain why I do not agree that the Supreme Court adopted a *per se* rule in *Lewis*, and why I think that the old axiom that bad cases sometimes make bad law applies [here]. The result is that the majority has created dangerous precedent whereby future courts applying the rule

> of this case have no choice but to blindly apply a rule of law without regard to the facts.

Id. at 873.

The Pennsylvania Court, like the *Helseth* majority, have misread *Lewis* and have blindly applied the intent to harm standard without considering the totality of circumstances surrounding the chase. In so doing, as Judge McMillan writes, the *Helseth* majority, and Pennsylvania Courts, have ignored Justice Souter's admonition in *Lewis* to analyze due process rights "by an appraisal of the totality of facts in a given case." *Id.* (citing *Lewis*, 523 U.S. at 849, 118 S. Ct. 1708).

Judge McMillan explains:

> Clearly, the "exact analysis of circumstances" in a given case requires more than rubber-stamping a particular rule of law. To suggest the Supreme Court endorsed such a mechanical approach in *Lewis* fails to give any sense of jurisprudential credit to the highest court of this land. *Lewis* requires that we apply "exact analysis" of "the totality of facts in a given case."

Id. at 874.

The Supreme Court should grant the instant Petition to review the substantial federal question at issue in this case. The Pennsylvania court, like the majority in *Helseth*, has applied a standard never intended by *Lewis*, namely, application of the intent to harm standard without consideration of the totality of facts involved in the chase. The Supreme Court must embrace this opportunity to revisit and clarify this issue.

Cases denying liability for police pursuit under the Fourteenth Amendment, including *Lewis*, have by implication created a template for circumstances where liability would be

appropriate. The facts established here of record fit that template. The police knew in advance that the offense was a minor one, and Joseph Ross was a 16-year-old boy who presented no risk to the public. Police were told that he would run rather than face the consequences of his action. When Lt. Schwarzl spoke directly with Jennifer DePew, Jennifer communicated Ross' panic to the defendant personally. Nonetheless, the lieutenant chose to follow the course of action that was most likely to escalate the situation and result in a public catastrophe, for no discernible reason other than her determination to vindicate her authority and the embarrassment suffered by her subordinate in having his personal property taken.

This case combines all of the elements found lacking in *Lewis* and other decisions in which liability was denied. The police were not faced with a sudden emergency, but rather had time to deliberate. The police could fulfill their mission of enforcing the law by arresting Ross later, without risk to the public. Ross presented no danger to the public; it was the police who created the danger by confronting him through the orchestrated efforts of their lieutenant. There was no doubt about the consequences of police action under these circumstances as they had been warned he would flee. Finally, given the minor nature of the offense, the disproportionate response by the police virtually compels the conclusion that the lieutenant's purpose here was to avenge an insult to a fellow officer and reinforce her authority in the neighborhood where the crime occurred.

If the jury's judgment in this case is to be denied on these facts as a matter of law, the right to be free from arbitrary exercise of governmental authority, a right protected by the substantive due process clause of the Fourteenth Amendment of the United States Constitution and 42 U.S.C. § 1983 would be rendered meaningless.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE COMMONWEALTH COURT OF PENNSYLVANIA DATED AND FILED JUNE 28, 2002

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1094 CD 2001

Marvin Thomas and Jacqueline Smith, h/w and Margaret Baldino and Diane DePew, Individually and as Administratrix of the Estate of Jennifer DePew, her daughter, deceased and Ruby Goode-Henry, Individually and as Administratrix of the Estate of Racquel R. Burnett, her daughter, deceased

v.

The City of Philadelphia and Officer Jay Bigle and Linda Lockwood, as administratrix of the Estate of Joseph Ross

Appeal of: Ruby Goode-Henry, Individually and as Administratrix of the Estate of Racquel R. Burnett, her daughter, Deceased

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No. 1095 CD 2001

Marvin Thomas and Jacqueline Smith, h/w, and Margaret Baldino and Diane P. DePew, Individually and as Administratrix of the Estate of Jennifer Lynn DePew, her daughter, deceased and Ruby Goode-Henry, Individually and as Administratrix of the Estate of Racquel R. Burnett, her daughter; deceased

v.

Appendix A

City of Philadelphia, Police Officer Jay Bigle, Sgt. Jodi Schwarzl and Linda Lockwood, Administratrix of the Estate of Joseph Ross, deceased

Appeal of: Linda Lockwood

No. 1096 CD 2001
Argued: March 11, 2002

Marvin Thomas and Jacqueline Smith, h/w, and Margaret Baldino and Diane P. DePew, Individually and as Administratrix of the Estate of Jennifer Lynn DePew, her daughter, deceased and Ruby Goode-Henry, Individually and as Administratrix of the Estate of Racquel R. Burnett, her daughter, deceased

v.

City of Philadelphia, Police Officer Jay Bigle, Sgt. Jodi Schwarzl and Linda Lockwood, Administratrix of the Estate of Joseph Ross, deceased

Appeal of: Jodi Schwarzl

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE MARY HANNAH LEAVITT, Judge
HONORABLE CHARLES P. MIRARCHI, JR., Senior Judge

Appendix A

OPINION
BY JUDGE LEAVITT FILED: June 28, 2002

This is an appeal[1] from an Order of the Court of Common Pleas of Philadelphia (trial court) in a negligence and civil rights case. The Order entered judgment *n.o.v.* in favor of defendant Sergeant Jodi Schwarzl (Sergeant Schwarzl) and against the plaintiff, Ruby Goode-Henry, Administratrix of the Estate of Racquel R. Burnett; entered a judgment of non-suit in favor of defendant City of Philadelphia (City); and entered judgment on the jury verdict absolving Officer Bigle from liability but holding Linda Lockwood, Administratrix of the Estate of Joseph Ross, liable in the amount of $744,000. We affirm.

This appeal arose from a multiple car crash that occurred on January 12, 1998 on Interstate 95 (I-95) in Philadelphia, in which three people were killed[2] and two others seriously

1. Three cases arising from the same incident were consolidated for appeal: the Appeal of Ruby Goode-Henry, administratrix of the estate of Racquel R. Burnett, her daughter, who was a passenger in the car driven by Marvin Thomas (1094 C.D. 2001); the Appeal of Linda Lockwood, administratrix of the estate of Joseph Ross, her son, who was the driver of the truck that was the subject of the police pursuit (1095 C.D. 2001); and the Appeal of Jodi Schwarzl, the police sergeant who directed the investigation and pursuit of Joseph Ross on the day of the fatal crash (1096 C.D. 2001). Settlements were reached on the cases filed by the other named plaintiffs either prior to or during trial.

2. Throughout this opinion, we use the decedent's last name to refer to a party, recognizing that in the litigation the actual party was the administrator of the decedent's estate. Depending on the context, the decedent's last name refers to the person killed in this tragedy or it refers to the estate.

injured. The accident occurred when Joseph Ross (Ross), a 17-year old suspect in a briefcase theft, proceeded in the wrong direction on 1-95, while attempting to elude the police. Ross's pick-up truck collided head on with a vehicle operated by Marvin Thomas (Thomas), who was injured; Thomas's passenger, Racquel Burnett (Burnett), was killed. Ross's truck then struck a car operated by Margaret Baldino, who was seriously injured. Ross and Jennifer DePew (DePew), a passenger in Ross's truck, were both killed.

Officer Jay Bigle (Officer Bigle) of the Philadelphia Police Department discovered the theft of his briefcase from his police cruiser at approximately 4:45 p.m. on the day of the accident. The accident occurred at 9:32 p.m. that night. During the intervening time Officer Bigle investigated the theft, receiving direction and assistance from his supervisor, Sergeant Schwarzl; together they conducted a house-to-house investigation. They identified Ross as the suspect and then learned that he could be apprehended at an intersection in northeast Philadelphia where he was taking his passenger, DePew. At 9:25 p.m., Ross appeared at the appointed intersection; however, he did not discharge his passenger as expected. Instead, he drove away, ignoring the flashing lights and sirens of several police vehicles; the police began a low speed pursuit through the streets of northeast Philadelphia. At 9:29 p.m., Ross entered an I-95 entrance ramp and made a sudden stop, causing Officer Bigle to hit Ross's truck and turn it perpendicular to the ramp. The truck was not seriously damaged, and Ross proceeded onto I-95 traveling north against southbound traffic. He was not followed. Sergeant Schwarzl immediately ordered the pursuit terminated and the flashing lights on the police cruisers cut in order to signal to Ross that the pursuit was over.

Appendix A

Thomas, Baldino, Burnett and DePew filed negligence actions against the City and against Ross. They also filed civil rights actions under 42 U.S.C. § 1983[3] against the City, Officer Bigle and Sergeant Schwarzl.

The City tendered the statutory maximum[4] to settle all of Baldino's claims and the negligence claims of all other

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3. It states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. §1983.

4. 42 Pa. C.S. §8528 provides, *inter alia*,

> (a) General rule.—Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

(Cont'd)

plaintiffs prior to trial. Although the insurer for Ross tendered the policy limits to all the plaintiffs it did so without a formal settlement and, therefore, Ross's liability in negligence was presented to the jury. The jury returned a verdict against Ross in the amount of $744,000.

The case proceeded on the remaining civil rights claims of Thomas, Burnett and DePew against the City and the two police officers. DePew and Thomas settled before trial, leaving only Burnett in the case. At the close of the presentation of Burnett's evidence, the trial court granted

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(Cont'd)

(b) Amount recoverable.—Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $250,000 in favor of any plaintiff or $1,000,000 in the aggregate.

(c) Types of damages recoverable.—Damages shall be recoverable only for:

(1) Past and future loss of earnings and earning capacity.

(2) Pain and suffering.

(3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.

* * *

the City's motion for nonsuit. The jury absolved Officer Bigle of liability but found Sergeant Schwarzl liable under Section 1983 of the Civil Rights Act to Burnett in the amount of $744,000.

The trial judge granted Sergeant Schwarzl's post-trial motion for judgment *n.o.v.* because the evidence presented by Burnett was not sufficient to show the high degree of culpability required to find liability under Section 1983 for the conduct of a police pursuit. The trial court determined that the verdict should have been rendered in favor of Sergeant Schwarzl and that no two reasonable minds could disagree on this determination.

Burnett filed post-trial motions objecting to the grant of nonsuit in favor of the City and challenging the trial court's jury instructions on future loss of earning capacity and on pre-impact fright. Burnett's motions were denied by the trial court. Ross filed a post-trial motion based on the trial court's refusal to submit the issue of contribution against the City to the jury; this motion was also denied. Burnett, Ross and Sergeant Schwarzl[5] filed timely appeals to this Court.

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5. Sergeant Schwarzl filed a timely cross-appeal on April 18, 2001 on the trial court's denial of qualified immunity, which was included in the summary judgment motions of Officer Bigle and Sergeant Schwarzl. The trial court denied Sergeant Schwarzl's motion to certify an interlocutory appeal based upon *Mitchell v. Forsyth*, 472 U.S. 511 (1985), which provides that an order denying qualified immunity is an appealable collateral order in federal court. Sergeant Schwarzl joins with the City in defending the order of the trial court on all other issues presented herein.

Appendix A

The central issue in this appeal is whether the trial court properly granted judgment *n.o.v.* in favor of Sergeant Schwarzl. Burnett asserts that Sergeant Schwarzl exhibited an intent to harm Ross that resulted in Burnett's loss of life.[6] The trial court held to the contrary using the analysis developed by the United States Supreme Court in the leading case, County of *Sacramento v. Lewis*, 523 U.S. 833 (1998), for determining when a police pursuit may give rise to civil rights liability. Burnett claims that the trial court did not properly apply the *Lewis* standard.

The second major issue is whether the trial court properly granted the City's motion for non-suit on Burnett's civil rights claim.[7] The trial court determined that Burnett did not present evidence sufficient to prove that the City had a policy of

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6. This Court's scope of review with respect to whether judgment n.o.v. is appropriate is plenary, as with any review of questions of law. *Phillips v. A-Best Products Co.*, 542 Pa. 124, 130, 665 A.2d 1167, 1170 (1995). The standards for reviewing a judgment n.o.v. are set forth in the text below

7. Our scope of review in an appeal from a trial court's denial of a motion to remove a nonsuit and to grant a new trial is limited to determining whether the trial court abused its discretion or committed (Pa. Cmwlth. 1992) (citing *Henry v. McCrudden*, 575 A.2d 666 (Pa. Cmwlth. 1990), *appeal denied*, 526 Pa. 651, 585 A.2d 470 (1990)). The standard for reviewing a decision to grant a nonsuit is well established. A nonsuit may not be granted unless, viewing all the evidence and all reasonable inferences arising from it in the light most favorable to the plaintiff, the jury could not reasonably conclude that the elements of the cause of action have been established. *Orner v. Mallick*, 639 A.2d 491 (Pa. Super. 1994).

deliberate indifference to her civil rights; Burnett's theory was that the City failed to enforce Directive 45, which, *inter alia*, provides guidelines for conducting a pursuit by police vehicle. Burnett argues that the trial court abused its discretion in this determination.

The final issue on appeal deals with Ross's claim for contribution. Ross argues that the trial court erred and abused its discretion in failing to submit the issue of contribution by the City to the jury and in denying Ross's post trial motion for contribution from the City.[8]

JUDGMENT *NON OBSTANTE VEREDICTO*

The court may enter judgment n.o.v. only in a clear case where, after reviewing the evidence most favorably to the plaintiff, no two reasonable minds could fail to agree that the verdict was improper and should have been rendered in favor of the movant. *Moure v. Raeuchle*, 529 Pa. 394, 402, 604 A.2d 1003, 1007 (1992); *Solomon v. Baum*, 560 A.2d 878, 880 (Pa. Cmwlth. 1989). It can be entered where appropriate as a matter of law or where the evidence requires it. *Id.* The court must consider only the evidence that supports the verdict and must afford the non-moving party the benefit of every fact and inference to be drawn from those facts. *Broxie v. Household Finance Co.*, 472 Pa. 373, 380, 372 A.2d 741, 745 (1977). To consider whether the police pursuit of Ross violated the civil rights of Burnett, the trial court applied

8. The subsidiary issues of the court's failure to charge the jury on future loss of earning capacity and pre-impact fright need not be addressed because we hold that the judgment n.o.v. and the nonsuit were properly granted by the trial court.

the *Lewis* standard of culpability, which requires proof of an intent to harm that is unrelated to the legitimate purpose of arrest. Applying this standard and giving Burnett every favorable inference from the facts, the trial court held that Burnett did not prove that Sergeant Schwarzl had an intent to hurt Ross beyond the intention to apprehend him. We agree.

Section 1983 of the Civil Rights Act protects citizens against deprivation of rights, privileges and immunities secured by the United States Constitution or act of Congress. Burnett relies on the substantive component of the due process clause of the Fourteenth Amendment that protects individual liberty interests against "certain government actions regardless of the fairness of the procedures used to implement them." *Daniels v. Williams*, 474 U.S. 327, 331 (1986). The United States Supreme Court has been reluctant to expand the concept of substantive due process "because guideposts for reasonable decision-making in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights, Texas*, 503 U.S. 115, 125 (1992). In *Collins*, the Supreme Court recited the history of the due process clause of the Fourteenth Amendment, which was adopted, the Court said, to prevent government from abusing its power or using it as an instrument of oppression. It is not " 'a guarantee against incorrect or ill-advised personnel decisions.' " *Id.* at 129 (quoting *Bishop v. Wood*, 426 U.S. 341, 350 (1976)). Rather, it protects citizens from the arbitrary exercise of the powers of government. Stated otherwise, a plaintiff must show intent; a government's lack of due care does not implicate the Constitution.

Appendix A

In *Lewis*, 523 U.S. at 833, the Supreme Court considered whether a police officer's high-speed pursuit of a motorcyclist that resulted in the death of the motorcycle passenger violated the substantive due process rights of the decedent. The Ninth Circuit held that the pursuit was undertaken with deliberate indifference to or reckless disregard for the passenger on the motorcycle, and, thus, it found liability under Section 1983. The Supreme Court granted *certiorari* to resolve a conflict among the circuits over the standard of culpability to be applied where it is alleged that a law enforcement officer in a pursuit has violated the substantive due process rights of a citizen. The different standards included "gross negligence," "reckless disregard," "deliberate indifference" and "shocks the conscience." Of these, the Court chose the most demanding standard of "shocks the conscience"[9] and held that it was not met in the *Lewis* case.

The Court explained that what may be a denial of fundamental fairness, shocking to the universal sense of fairness,

9. In *Lewis*, the Supreme Court provided a précis of the "shocks the conscience" test in civil rights cases. The leading case is *Rochin v. California*, 342 U.S. 165 (1952), wherein the police, without benefit of search warrant, entered Rochin's home and bedroom in time to watch him swallow two capsules. They took him to the hospital where he was forced to have his stomach pumped in spite of his protests. This was found to "shock the conscience" and to violate "decencies of civilized conduct." "Brutal," "offensive" and "violating a traditional sense of fair play" are other ways to describe "shocks the conscience." The Court acknowledged that "what is conscience shocking is no calibrated yardstick, [but] it does, as Judge Friendly put it, 'point the way.'. . ." Lewis, 523 U.S. at 846-847. A strong dissent argued that "shocks the conscience" is too subjective a standard to point at all.

in one set of circumstances, may fall short in another. *Betts v. Brady*, 316 U.S. 455, 462 (1942). Liability for negligently inflicted harm, the customary tort standard, is categorically beneath the threshold of constitutional due process. *Daniels*, 474 U.S. at 333. Conduct by state officials deliberately intending to injure, unjustifiable by any government interest, is the sort of official action most likely to rise to the conscience-shocking level.

The *Lewis* Court opined that "deliberate indifference" may be sufficient to shock the conscience in some circumstances but only when actual deliberation is practical. *Whitley v. Albers*, 475 U.S. 312, 320 (1986). For example, refusing medical treatment to someone jailed while awaiting trial may be such deliberately indifferent conduct that it will shock the conscience. *Lewis*, 523 U.S. at 850. In a custodial situation, the government official has time to make "unhurried judgments" and the opportunity for repeated reflection.[10] *Id.* Where the police are faced with lawless behavior that requires an instinctive response, even unreasonable behavior by the police that would be actionable under standard tort law, does not shock the conscience. The Supreme Court in *Lewis* concluded:

> But when unforeseen circumstances demand an officer's instant judgment, *even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock* that implicates "the

10. However, the deliberate indifference standard is not applicable in all prison cases. It will not apply in the case where prison officials face a riot calling for fast action. *Lewis*, 523 U.S. at 852, citing *Whitley*, 475 U.S. at 320.

> large concerns of the governors and the governed." Just as a purpose to cause harm is needed for Eighth Amendment liability in a riot case, so it ought to be needed for due process liability in a pursuit case.
>
> *Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability* under the Fourteenth Amendment redressible by an action under § 1983.

Lewis, 523 U.S. at 853-854 (emphasis added).

Notwithstanding the Supreme Court's holding and analysis in *Lewis*, Burnett claims that the appropriate standard to apply here is deliberate indifference. She does so on the argument that the relevant time period for doing the constitutional analysis falls between 4:45 p.m. and 9:32 p.m., *i.e.*, from the moment of theft to the moment of the accident. This five hour period allowed for deliberation, and Burnett asserts that the police did so in a manner indifferent to her life. The trial court, however, based its analysis on the six-minute period between initiation of the pursuit and the accident, a period too short in duration to allow for deliberation.[11] Burnett also maintains that the police were improperly motivated by a personal sense of outrage at a *theft from a police vehicle* and, therefore, they initiated a pursuit of Ross without any legitimate law enforcement

11. This finding of the trial court is consistent with the Supreme Court's holding in *Whitley*.

objective. Thus, she argues that the deliberate indifference of the police shocks the conscience and shows that the police intended to harm Ross. We reject this line of reasoning.

The decision of the police to pursue Ross would have been the same had the police witnessed the theft instead of determining that Ross was a suspect from their investigation of the crime just prior to initiating pursuit. The police had a duty to investigate the crime, and they had the right to try to apprehend a suspect. Further, the lawful investigation that preceded the pursuit does not change the central and controlling point that this is a police pursuit case. Burnett would have us ignore that central fact and consider, instead, all of the government action undertaken by the police in the resolution of the theft.[12] By merging the investigation phase with the apprehension phase of a criminal case that ended in a police pursuit, any such police pursuit could be measured against the standard of deliberate indifference. This approach is directly at odds with the holding in *Lewis*.

Burnett also argues that because the police were advised during the investigation that Ross might attempt to elude arrest, the police were absolutely precluded from pursuing him in an attempt to apprehend him and recover the stolen property. She argues from several false premises: that the

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12. Burnett further maintains that the Directive 45 allowed the individual officers no discretion in initiating the pursuit of suspects. The language of Directive 45 does not support this position. Directive 45 gives direction on the operation of police vehicles and the considerations before initiating a pursuit, but it specifically commits the decision to initiate a pursuit to the individual officer. *See, infra* note 23.

police should have assumed that Ross would, in fact, attempt to elude the police; that the police should have given paramount significance to one comment, out of many heard in the course of the investigation; and that the police should have decided on some other means to apprehend their suspect. The irrational decision of Ross to drive approximately three miles on the interstate highway against the flow of traffic was a completely unpredictable action, and it is the action that caused the tragic deaths on the highway.

Although the trial court limited its analysis to the actual time frame of the chase, it did consider the antecedent investigation. The trial court noted that although the energy expended by the officers in solving this petty theft may have been more zealous than it would have been for a similar theft of a private citizen's property,[13] none of the facts of the investigation are sufficient to prove that the police intended to harm Ross when the decision was made to pursue him. It is the motivation for that decision, alone, under the circumstances of the suspect's lawless behavior in eluding the police, which must be scrutinized. The pursuit was short in duration; the pursuit was conducted at tow speed; the pursuit was called off; and the police cruisers were not

13. Whether the people of Philadelphia would have been better served that day by an investigation of a more serious crime by a more hardened criminal is not an appropriate inquiry for the courts. Prosecutorial discretion includes choosing which crimes to investigate and how much effort to expend. Such discretion is beyond judicial review. *Commonwealth v. Malloy*, 450 A.2d 689 (Pa. Super. 1982). "Motivation" in a civil rights case refers to the intention to abuse power for the purpose of depriving a citizen of constitutionally-protected rights.

permitted to enter the interstate highway.[14] Ross's refusal to stop his vehicle in response to the police lights and sirens was lawlessness to which the police reacted, without any time to deliberate. There is no evidence that the pursuit of Ross was motivated by an intent to induce lawlessness, or to terrorize, cause harm, or kill the suspect; as in *Lewis*, the police acted instinctively to apprehend a suspected criminal offender, a legitimate governmental interest.

The trial court considered all the evidence in the record supporting the verdict, but that evidence was legally insufficient to allow reasonable minds to agree that it supported a verdict against Sergeant Schwarzl. In reaching this conclusion, the trial court correctly applied the "shocks the conscience" standard, rather than the deliberate indifference standard, to hold that Sergeant Schwarzl did not intend to harm Ross when she ordered his pursuit and, thus, could not be called to answer for her conduct under Section 1983.

NON-SUIT AGAINST THE CITY OF PHILADELPHIA

Burnett maintains that the City failed to enforce Directive 45 over a five year period, and this demonstrates deliberate indifference to public safety in violation of Burnett's

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14. By contrast, the pursuit in *Lewis* reached speeds of over 100 m.p.h. in a residential neighborhood, and *it was not called off.* As observed by the Court, "Willard's [the motorcyclist] outrageous behavior was practically instantaneous, and so was Smith's instant response. While prudence would have repressed the reaction, the officer's instinct was to do his job as a law enforcement officer, not to induce Willard's lawlessness, or to terrorize, cause harm or kill." *Lewis*, 523 U.S. at 855.

substantive due process rights. By Directive 45, entitled "Safe Operation of Police Vehicles," the police department established criteria to be considered by the police in initiating and continuing vehicle pursuits of suspects. Burnett proffered statistical data[15] and the testimony of an expert in support of her claim of deliberate indifference. The trial court agreed that the standard of deliberate indifference was the appropriate one to apply when considering municipal liability, but it found the evidence in question was too vague to have any probative value and refused to admit it. A trial court enjoys broad discretion to make evidentiary rulings, and absent abuse of discretion such decisions will not be set aside on appeal. *Henery v. Shadle*, 661 A.2d 439 (Pa. Super. 1995), *alloc. denied*, 542 Pa. 670, 668 A.2d 1133 (1995). A judgment of nonsuit[16] can be entered only in clear cases, and a plaintiff must be given the benefit of all evidence favorable to him, together with all reasonable inferences of fact arising therefrom, and any conflict in the evidence must

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15. The documentation was compiled and prepared by the Philadelphia Police Department and was entered into the record by the trial judge. Exhibit C is a report of the Police Accident Reduction Unit; Exhibit D is a Management Review Bureau Police Vehicle Accident Reduction Study; Exhibit E is a Safety Study prepared for the Risk Management Division of the City of Philadelphia's Finance Department.

16. An order granting a nonsuit is proper only if the jury could not reasonably conclude that the elements of the cause of action have been established. *Ford v. Jeffries*, 474 Pa. 588, 591-592, 379 A.2d 111, 112 (1977). It is the duty of the trial judge to determine, prior to sending the case to the jury, whether or not the plaintiff has met this burden. *Morena v. South Hills Health System*, 501 Pa. 634, 462 A.2d 680 (1983).

be resolved in his favor. Pa. R.C.P. No. 230.1; *Flagiello v. Crilly*, 409 Pa. 389, 390-391, 187 A.2d 289, 290 (1963).

In her appeal, Burnett asserts that the trial court abused its discretion when it refused to admit Bumett's statistical case, leaving virtually no evidence to support her Section 1983 claim against the City. She also claims that she may pursue the City separately under Section 1983 even if we uphold the trial court's grant of judgment n.o.v. in favor of Sergeant Schwarzl. We disagree that she may proceed against the City where its employees have been found blameless of constitutional misconduct.

Municipal liability under Section 1983 of the Civil Rights Act was first allowed in *Monell v. Department of Social Services*, 436 U.S. 658 (1978),[17] in which the Supreme

17. In *Monell*, the Supreme Court overruled its prior determination in *Monroe v. Pope*, 365 U.S. 167 (1961), that municipalities are not "persons" to whom Section 1983 applies. Under *Monell*, local government bodies can be sued directly under Section 1983 for monetary, declaratory, or injunctive relief where the action complained of executes a policy statement, ordinance, regulation, or decision officially adopted by that body's officers. The local governmental unit may also be directly sued for constitutional deprivations pursuant to governmental "custom" even though such a custom has not received formal approval through the official decision making channels. *Monell*, 436 U.S. at 690. The Court held, however, "(T)he language of Section 1983 . . . compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort. In particular, we conclude that a municipality cannot be held liable *solely* because it employs a tortfeaser — or,

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Court overruled prior case law to hold that a municipality is a "person" within the meaning of Section 1983. Under *Monell*, it was also established that the city's policy must be the "moving force [behind] the constitutional violation;" *respondeat superior* cannot serve as the basis for municipal liability under Section 1983.

In *City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989), the Supreme Court extended Section 1983 municipal liability to inadequate training of a city's employees. In *Canton*, Mrs. Harris was arrested and brought to the police station. While there, she spoke incoherently and slumped to the floor on two occasions; the police left her on the floor to prevent more falls. After one hour she was released, and her family took her to the hospital by ambulance. She was diagnosed as having severe emotional problems, hospitalized and received outpatient treatment for one year. The question was whether the city could be held liable under Section 1983 for failing to provide her medical treatment while in its custody. Ultimately, the case was remanded[18] to the District Court for

(Cont'd)

in other words, a municipality cannot be held liable under § 1983 on a *respondeat superior* theory." *Id.* It is when execution fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983." *Monell*, 436 U.S. at 694.

18. Justice O'Connor dissented to the remand. She agreed with the principles announced in *Canton*; however, she believed the record was fully developed on the issue of Canton's liability and that it did not support such a finding. It is one thing to train police to recognize life-threatening episodes, quite another to train them in the intricacies of mental health.

more fact-finding; the case, however, served as the platform for the Supreme Court's enunciation of the principles by which to judge whether a municipality can be held liable for failing to train its police officers.

In *Canton*, the city's express policy required that a jailer attend to the medical needs of those detained; the policy was valid. The Supreme Court rejected the city's argument that only policies unconstitutional on their face should give rise to Section 1983 liability, as was the case in *Monell.*[19] Instead, it held that where the police are not trained adequately on the valid policy and the "constitutional wrong has been caused by that failure to train," liability will attach. *Canton*, 489 U.S. at 387. The issue, then, is whether a city's failure to train can justifiably be considered a "city policy." Because this failure to train results from "unhurried judgment," the standard of culpability is deliberate indifference to the constitutional rights of its inhabitants.[20] *Id.* at 392.

Where the municipal policy on its face is not unconstitutional, but rather, plaintiff asserts there is a policy of failing

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19. In *Monell*, the policy in question required pregnant city employees to go on leave before it was medically necessary.

20. In *Canton*, the court quoted from *Pembaur v. City of Cincinnati*, 476 U.S. 469, 483 (1986); where it held:

> [M]unicipal liability under § 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by city policymakers. . . .

Canton, 489 U.S. at 389.

to train, the evidentiary burden is a high one. It is necessary for the plaintiff to show a causal connection between the "policy" and the constitutional deprivation, and the policy must be the "moving force" behind the injury.[21] The adequacy of the program, not the shortcomings of a particular officer, is the focus of the inquiry. It will not suffice that a sound program is occasionally negligently administered or that a particular officer needed more training. As the Court noted in *Canton*, "And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the basis for making the city liable." *Id.* at 391.

Because the policy must be the focus in a municipal liability case, a single incident of unconstitutional activity is not sufficient to impose liability. Unless proof of the single incident includes proof that it was directly caused by an unconstitutional activity, one incident is not sufficient to impose liability.[22] The Supreme Court cautioned that it did not intend to "engage the federal courts in an endless exercise of second-guessing municipal-training programs. This is an exercise we believe the federal courts are ill-suited to undertake as well as one that would implicate serious questions of federalism." *Canton*, 489 U.S. at 392.

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21. This was announced in *Monell*; *see also Board of the County Commissioners v. Brown*, 520 U.S. 397 (1997).

22. *City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985) (wherein the Court held that the evidentiary burden of plaintiff in a Section 1983 case cannot be satisfied by inference from a single incident of excessive use of force by a police officer).

Against those principles, we test Burnett's claim against the City on Directive 45.[23] Burnett does not challenge the validity of the policy expressed in Directive 45; indeed, its goal of safety is unassailable. However, she claims that, as in *Canton*, Directive 45 was unconstitutionally applied. Specifically, she asserts that the City failed to train, supervise and discipline its police officers for violations of Directive 45. This "policy" was deliberately indifferent to the safety of the public and caused the constitutional harm to Burnett. Evidence to support this claim, however, was found to be entirely lacking by the trial court.

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23. Directive 45, entitled "Safe Operation of Police Vehicles," is a twelve-page document with appendices, that states a policy of "preventing accidents, injuries and property damage during routine and emergency operation." S.R. 65a. It addresses the topic of routine vehicle operation as well as emergency vehicle operation, pursuits, operating a vehicle in reverse, motorcycles, parking and traffics. The section on pursuits is the longest. It outlines the duties of an initiating officer, those of Police Radio and the monitoring supervisor in a pursuit, and it provides instruction on when a pursuit is appropriate, such as when a vehicle has been stolen or is being operated in a manner that creates a danger to others. It states that

> an officer may attempt, through proper emergency driving technique or other sound police procedures, to accurately identify, and when possible, apprehend a violator for ANY offense.

S.R. 95a.

Appendix A

Burnett's proffered evidence[24] consisted of statistics on the number of accidents and the number of pursuits that occurred in Philadelphia from 1993 through 1997. Over this period the data showed: that accidents occurred involving City vehicles; that some of the accidents occurred during or as a result of police pursuits; that some of the pursuits were in violation of the recommendations of Directive 45; and that approximately 10% of the accidents resulted in formal discipline of the officers involved.

The data are absent of any, detail, such as the cause of the accidents or of the injuries. Directive 45 requires police to use seat belts, and this "violation" of policy could be the basis of injury. The data had no detail on police pursuits, the circumstances that initiated them, how they were conducted and other facts that would make the raw data meaningful. This additional information was available to Burnett's experts who declined to review it. Further, Burnett's experts did not attempt to design their own study using methodology that could be tested at trial. Notwithstanding these problems with the data, Burnett's expert, Dr. Territo, drew the sweeping conclusion in his report[25] that the City had failed to adopt an

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24. The record contains a colloquy on the admissibility of the statistics and the testimony of Burnett's expert and the ruling by the trial judge to exclude the evidence. R.R. 904a - 946a. The expert was permitted to testify on other matters.

25. Dr. Territo concluded in his report, *inter alia*, that: (8) The Philadelphia Police Department did not have appropriate policies adequately enforced to deal with the problem of police pursuits; and (9) if appropriate police procedure had been followed, the accident

(Cont'd)

appropriate enforcement policy and that had Directive 45 been enforced, accidents would not have occurred.

A trial court's decision not to admit evidence is reviewed only for abuse of discretion. As stated by our Supreme Court,

> Once the trial judge determines the evidence is relevant, the further task of the judge is to balance the probative value of evidence against any prejudicial effect of that evidence. Since such a balancing is a particular specialty of the trial judge, rulings upon admissibility are committed to the sound discretion of the trial court, and those rulings will not be overturned in the absence of an abuse of discretion.

Henery v. Shadle, 661 A.2d at 444. The trial court did not abuse its discretion in not admitting the evidence proffered by Burnett. The data, such as they were, failed to make a causal connection between the alleged lack of enforcement and police car accidents, let alone pursuits that violated substantive due process rights. Moreover, they did not show that the City was the "moving force" in Burnett's deprivation

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involving innocent civilians would not have occurred. R.R. 935a. The data, however, was not sufficient to bear out the claim of "innocent civilian" injury. The trial court determined that these conclusions could not be based upon the statistics presented because the statistics were too vague to define what type of accidents occurred, what elements came into play to cause the accidents, and whether the statistics were actually alarming in their proportions to the activities of the Philadelphia police force.

of constitutional rights. Lastly, the inferences of the expert were not credible. As observed by the trial court, a 10% discipline rate says nothing; it may represent a high, not a low, rate of enforcement.[26]

There is another, even more basic problem with Burnett's case against the City: the police involved in the Ross pursuit were found *not* to have violated her substantive due process rights. In *Canton*; the Supreme Court cautioned that a plaintiff may not infer a failure to train from a single unconstitutional action; here Burnett tries to make this inference without even a *single* unconstitutional action by the City's employees.

A municipality cannot be held liable for the actions of its employees, such as the use of excessive force, if its employees did not commit a constitutional violation. To do so would turn the doctrine of *respondeat superior* on its head. Burnett was required to prove an underlying constitutional violation by City employees before she could seek to hold the City also liable for its own unconstitutional conduct. Since there was no underlying constitutional violation by Officer Bigle or Sergeant Schwarzl, the nonsuit was proper on purely legal grounds.

To be sure, Burnett directs our attention to authority for a contrary view. In *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994) the Third Circuit Court of Appeals held:

> We hold that in a substantive due process case arising out of a police pursuit, an underlying

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26. As noted by the City, the discipline data record only shows formal actions and not lesser discipline actions, such as reprimands. So the data do not tell the entire enforcement story.

> constitutional tort can still exist even if no individual police officer violated the Constitution. . . . The City is liable under section 1983 if its policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers to conduct the pursuit in an unsafe manner and deprive the plaintiffs of life or liberty.

Id. at 1292. The Court explained that even though a police officer's conduct does not meet the "shocks the conscience" standard, this does not absolve the municipality. If it can be shown that the plaintiff suffered a deprivation of life or liberty because the officer was following a city policy, then the city can be liable under Section 1983. The Court reasoned that "[t]he pursuing police officer is merely the causal conduit for the constitutional violation committed by the city." *Id.*

At best, *Fagan* provides a thin reed of support. It has not stood the test of time even in the Third Circuit. As noted by a subsequent panel, in commenting on *Fagan*,

> It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the *Collins* test, the panel opinion did not apply the first prong — establishing an underlying constitutional violation.

Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995). Because plaintiff could not show that his constitutional rights were violated by a Borough of Hatboro police officer, he could not proceed against the borough under a failure to train

theory. See also, *Leddy v. Township of Lower Merion*, 114 F. Supp. 2d 372, 376 (E.D. Pa. 2000), which notes the "split" in the Third Circuit on the issue of municipal liability where there is no underlying constitutional violation.

The response of other circuits to *Fagan* has been even less sanguine. In *Trigalet v. City of Tulsa, Oklahoma*, 239 F.3d at 1150 (10th Cir. 2001), the Tenth Circuit Court of Appeals refused to allow a case against the City of Tulsa for a Section 1983 violation in the absence of unconstitutional behavior by city employees. It turned first to the U.S. Supreme Court holding in *City of Los Angeles v. Heller*, wherein it was said:

> If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point.

475 U.S. 796, 799 (1986) (emphasis the Court's).[27] Next, *Trigalet* listed decisions from First, Fourth, Sixth, Seventh, Eighth, Ninth and Eleventh Circuits, all holding that the threshold issue in a municipal liability case is "whether the action causing the harm (police pursuit resulting in death of innocent bystander) states a constitutional violation at all." *Trigalet*, 239 F.3d at 1155. The Tenth Circuit identified *Fagan* as the single contrary decision but concluded that in light of

27. *Fagan* tried to distinguish *Heller* on the grounds that it was a Fourth Amendment case, as opposed to a Fourteenth Amendment case.

Hatboro, the viability *of Fagan* even in the Third Circuit is doubtful.[28]

Fagan is instructive but not binding on this Court,[29] and its instruction is less than persuasive for the reasons set forth above. *Heller* bars Burnett from pursuing the City under Section 1983. We hold, therefore, that in the absence of an underlying unconstitutional action by employees of the City against Burnett, we will not consider the question of whether

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28. *Trigalet* also lists all decisions criticizing and expressly rejecting *Fagan*.

29. In *A.L. Lockhart v. Fretwell*, 506 U.S. 364, 376 (1993), the concurring opinion noted:

> The Supremacy Clause demands that state law yield to federal law, but neither federal supremacy nor any other principle of federal law requires that a state court's interpretation of federal law give way to a (lower) federal court's interpretation. In our federal system, a state trial court's interpretation of federal law is no less authoritative than that of the federal court of appeals in whose circuit the trial court is located.

This principle was underscored in our Supreme Court's decision in *Commonwealth v. Cross*, 555 Pa. 603, 726 A.2d 333 (1999). Cross argued that the Pennsylvania Supreme Court had been "reversed" by a Third Circuit opinion. Our Supreme Court set Mr. Cross straight: only the U.S. Supreme Court can reverse the Pennsylvania Supreme Court. State supreme courts have concurrent jurisdiction with lower federal courts over federal constitutional questions and may formulate their own interpretation of Supreme Court precedent, which may be in opposition to that of the lower federal courts.

the City failed to train those employees on Directive 45; it is "quite beside the point."

The trial court's entry of a compulsory nonsuit was proper. Burnett tragically lost her life, but this cannot be tied to an unconstitutional action of the police. Thus, she cannot proceed against the City under Section 1983. The trial court did not abuse its discretion in excluding the evidence she proffered. In the absence of a legal foundation or any evidence, no holding but a nonsuit is conceivable.

ROSS CLAIM FOR CONTRIBUTION

Ross cites as error the trial court's refusal to instruct the jury on the joint tortfeasor status of the City, and filed post trial motions seeking contribution from the City in negligence. The trial court denied these post trial motions, which Ross has appealed to this Court.

The record does not contain a direct negligence claim asserted by Ross against the City. By way of pleading new matter in its answer to the complaint, Ross sought to establish that the City was "liable over" to the Estate of Ross on the cause of action asserted by Burnett. The trial court correctly precluded Ross from asserting a claim for contribution by the City to the jury because no such right exists. The City is immune from a direct suit in negligence under the holding in *Lindstrom v. City of Corry*, 563 Pa. 579, 763 A.2d 394 (2000). Ross did not file a direct negligence action and, therefore, has no right to share in the negligence settlement tendered by the City to the plaintiffs.

Appendix A

Ross asserts a right to contribution from the City as a joint tortfeasor, but cites no authority that would compel contribution under the facts of this case. The City has tendered the statutory maximum, and that amount exceeds the amount tendered by Ross's insurance carrier on behalf of his insolvent estate. Ross is also precluded from contribution under the holding of this Court in *Kriner v. Barbour*, 602 A.2d 450 (Pa. Cmwlth. 1992), *alloc. denied*, 531 Pa. 656, 613 A.2d 591 (1992). The trial court's ruling on the issue of contribution by the City in the negligence action was a reasonable exercise of discretion.

CONCLUSION

We hold that the judgment n.o.v. in favor of Sergeant Schwarzl was proper; the judgment of non-suit in favor of the City was proper; and the denial of Ross's claim for contribution from the City was proper.

Accordingly, we affirm the trial court's Order.

s/ Mary Hannah Leavitt
MARY HANNAH LEAVITT, Judge

APPENDIX B — OPINION AND ORDER OF THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY, CIVIL TRIAL DIVISION DATED APRIL 4, 2001

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

NOVEMBER TERM, 1998

NO. 1847

MARVIN THOMAS & JACQUELINE SMITH, h/w and MARGARET BALDINO and DIANE P. DePEW, Individually and as Administratrix of the Estate of JENNIFER LYNN DePEW, her Daughter, Deceased, and RUBY GOODE-HENRY, Individually and as Administratrix of the Estate of RACQUEL R. BURNETT, her Daughter, Deceased

VS.

CITY OF PHILADELPHIA, OFFICER JAY BIGLE, SERGEANT JODI SCHWARZL, ET AL.

OPINION

BY: VICTOR J. DiNUBILE, JR., J.

This Opinion arises from a grant of Judgment NOV entered in favor of the defendant, Sergeant Jodi Schwarzl[1],

1. This defendant has since been promoted to Lieutenant.

and against the plaintiff, Ruby Goode-Henry, Administratrix of the Estate of Racquel R. Burnett, her deceased daughter (hereinafter referred to as plaintiff, plaintiff's decedent or Burnett), stemming from a jury verdict in the latter's favor. This cause of action arose from alleged violations of the decedent's civil rights under 42 U.S.C.A. Sec. 1983. The suit stemmed from a police chase during which the plaintiff's decedent was killed. The fatal crash occurred when a 17 year old theft suspect, while attempting to elude police, proceeded in the wrong direction on I-95 in northeast Philadelphia, striking the vehicle operated by Marvin Thomas head on; in which plaintiff's decedent was a passenger. Mr. Thomas, who was operating his vehicle in a southerly direction, was seriously injured. The suspect, Joseph Ross, and his companion, Jennifer Lynn DePew, were also killed. This plaintiff, Ms. DePew's Estate, Mr. Thomas, as well as a fourth person, Margaret Baldino, injured in this accident, commenced negligence actions against defendant, City of Philadelphia.[2] Civil rights suits were brought under 42 U.S.C.A. Sec. 1983, alleging violation of Fourteenth Amendment Due Process Rights, against the City, Officer Jay Bigle and Sergeant Jodi Schwarzl of the Philadelphia Police Department. Ms. Baldino's case and the negligence claims of all the plaintiffs were settled prior to trial. Trial commenced solely as to the Section 1983 civil rights claims against the City and the two defendant police officers brought by plaintiff, the DePew Estate and Mr. Thomas. DePew and Thomas settled during trial. Thus, the case proceeded to verdict only as to plaintiff's decedent.

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2. See *Jones v. Chieffo*, 700 A.2d 417 (PA. 1997), which held that the City was not immune from suit in negligence where innocent people are injured resulting from police pursuits.

Appendix B

The plaintiff's theory with respect to claims against the police and the two police officers centered on the police activity and conduct prior to and during the pursuit of the suspect. The civil rights case against the City was predicated upon a violation of a police department directive involving safe operation of police vehicles. At the close of the plaintiff's case, after excluding certain evidence involving alleged violation of this directive, the court found no connection between the proposed evidence and any constitutional violation on the part of the City, a nonsuit was granted in the City's favor. Trial then proceeded against Officer Bigle and Sergeant Schwarzl. The jury absolved Officer Bigle from liability but found Sergeant Schwarzl liable to the Estate in the amount of $744,000 for loss of future earnings under the Survival Death Act. The Estate of Joseph Ross, the suspect, also was sued. Since there was no formal settlement, although an amount of $30,000 was paid to all the plaintiffs representing the full extent of insurance coverage on the Ross vehicle, his liability in negligence was presented to the jury as well The jury also found defendant's decedent, Ross, liable for the same sum of $744,000.

Post trial motions were filed by defendant, Schwarzl, principally attacking the sufficiency of the evidence to establish liability under Section 1983 The plaintiff filed cross-post trial motions based on the grant of nonsuit in favor of the City. Plaintiff further challenged the court's charge as to future loss of earning capacity and its failure to charge on pre-impact fright. The defendant Ross also sought post trial relief based on the court's refusal to submit the issue of contribution against the City to the jury. As stated, the post trial motion of defendant Schwarzl for Judgment NOV is

granted. The plaintiff's motions requesting a new trial against the City, as well as those pertaining to the court's charge and failure to charge on damages, are denied. Defendant Ross' Estate's request for post trial relief is denied. The rationale for these rulings will be discussed *seriatim*.

SUMMARY OF ISSUES

The primary issue arising from this court's Order granting Judgment NOV and raised in defendant's post trial motions, is whether there was sufficient evidence presented to overcome the high standard of proof required in a civil rights action arising out of a police pursuit. The standard set forth by the United States Supreme Court in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708 (1998) requires a showing that the conduct of Sergeant Schwarzl exhibit an intent to harm Mr. Ross, unrelated to the legitimate purpose of the arrest, and that her actions caused harm to the plaintiff. This court concludes that the plaintiff failed to meet this onerous burden.

The court arrived at this decision principally because the pursuit in question, orchestrated by defendant Schwarzl, including the time the Ross vehicle entered I-95 Expressway in the wrong direction (proceeding northbound in the southbound lane), lasted less than six minutes. The police had terminated their chase as soon as Ross entered I-95. The suspect then proceeded to travel 3.26 miles at a speed of about 60 miles per hour, striking the vehicle in which the decedent was a passenger, approximately 3 minutes and 26 seconds after entering the highway. Facts showed that the actual chase involving the police took no more than three

minutes at best. A second major issue arises from the plaintiff's cross-post trial motion challenging the court's grant of non-suit against the City as to plaintiff's deliberate indifference civil rights claim. It stemmed from the alleged failure, over a five year period, to enforce Police Directive 45 pertaining to safe operation of police vehicles. The evidence sought to be introduced by plaintiff in support of a long term failure to enforce this directive was too vague and irrelevant. It was excluded; resulting in the nonsuit. The plaintiff also takes issue with the court for failure to charge the jury on preimpact fright as a measure of damages. A challenge also is made to the court's charge involving future lost earning capacity which, plaintiff's counsel maintains, did not take into consideration the "total offset method." Instead, the court charged pursuant to federal law that any future loss of earning capacity had to be reduced to present worth. Although the court's grant of Judgment NOV would render these latter two motions moot, the court will discuss them along with the Ross Estate's assertion of contribution from the City, after first conducting a review of the two major issues.

FACTS

In order to adequately analyze these two issues (whether plaintiff met its burden as to the pursuit civil rights claim and whether it was proper to non-suit plaintiff as to the deliberate indifference civil rights action involving alleged failure to enforce the police directive in question), the tragic facts stemming from this police chase, in which the jury found a violation of plaintiff decedent's civil rights, pursuant to 42 U.S.C.A. Sec. 1983, must be undertaken. In doing so,

every possible inference in favor of the plaintiff must be given in order to apply the standard for a grant of Judgment NOV, that no two reasonable minds could disagree that the outcome should have been rendered in favor of the defendant, see *Lockwood v. City of Pittsburgh*, 751 A.2d 1136 (Pa. 2000); *Brown v. PCOM*, 760 A.2d 863 (Pa. Super. 2000).

During the late afternoon hours of January 12, 1998, defendant Officer Jay Bagle of the Philadelphia Police Department was on a routine call on Tulip Street in the Bridesburg section of Philadelphia to verify the fact that a recently reported stolen car had been found by the owner. While inside the owner's house, he noted that the lights on top of his police car were lit. When he went to the car he also found that his briefcase, containing a black-jack, knife, flashlight, tickets and other paperwork, was missing. Thinking that possibly one of his fellow officers was playing a prank on him, he cruised around the neighborhood for about five to ten minutes in order to locate and confront them. Prior to meeting up with any of his fellow officers, he received a call to proceed to Keystone Street, in the Bridesburg area. He remained there for approximately 15 minutes; completing his assignment and returning to the 15th District at Harbison and Levick Streets (in northeast Philadelphia). Upon arrival, at approximately 5:30 PM, he began making phone calls to fellow officers about his missing briefcase. His Sergeant in charge, co-defendant Jodi Schwarzl (now a Lieutenant), overheard these conversations and took over the investigation of the missing briefcase. Convinced that no officers were involved, Sergeant Schwarzl and Officer Bigle, in separate cars, proceeded to Tulip Street where they conducted inquiry concerning the missing items. Sergeant Schwarzl spoke with

a young man on the steps of one of the homes who told her that a boy named "Joe" (later identified as suspect Joseph Ross) and a girl named "Jen" (later identified as his decedent companion and one of the settling plaintiffs) took the briefcase and left in a Ford Ranger pickup truck. Sergeant Schwarzl, learning of the actual identities of the two from the boy's parents, proceeded to call Mrs. DePew, the plaintiff Administrator of her deceased daughter, Jennifer Depew's, Estate, on the phone. Mrs. DePew stated that she thought her daughter may be at work at Eckerd's Drug Store on Aramingo Avenue. A car was dispatched to that location. In the meantime, Officer Bigle and Sergeant Schwarzl proceeded to the 4400 block of Garden Street, the home of Mrs. DePew. Sergeant Schwarzl inquired as to the whereabouts of her daughter, necessitating Mrs. DePew to page her on Jennifer's personal pager. Shortly thereafter, the deceased responded by phone and spoke to her mother who became upset, telling her daughter that the police were looking for her and the briefcase. Sergeant Schwarzl took the phone to calm down Miss DePew before attempting to obtain information from her. During this time, Sergeant Schwarzl heard Jennifer yelling at a young man (Joseph Ross), stating words to the effect, "You took the briefcase. I did not." and expressed a desire to go home. Sergeant Schwarzl asked the deceased where she would be let off by Ross. Realizing that Jennifer could not speak freely over the phone, Sergeant Schwarzl mentioned various drop-off places. Finally, Miss DePew responded affirmatively to Richmond and Lefevre Streets. Sergeant Schwarzl left the DePew residence and notified several police patrol cars to proceed to that vicinity. Police cars already had been dispatched in the area to look for the briefcase. Sergeant Schwarzl knew

by that time, although she did not remember how she received the information, that the deceased driver Joe would flee if confronted.

Shortly thereafter, at approximately 9:25 P.M., Officer Malinka Bragg, traveling on Richmond Street, saw the Ford pick-up truck driven by defendant decedent Joseph Ross proceeding in the opposite direction turning left onto Hedley Street. Officer Bragg followed Ross down Hedley Street for several blocks until a dead end. Ross then turned the pickup truck in the opposite direction followed by Officer Bragg. Ross was not traveling at a high rate of speed, although he nearly struck a parked tractor trailer, He then turned left on Richmond Street, still being followed by Officer Bragg. He proceeded on Richmond Street until he turned up a ramp to the Betsy Ross Bridge leading to New Jersey. At this time, Officers Bigle and Vincent Visco, in separate cars, were in pursuit behind Officer Bragg. The youth then made an illegal U-turn, crossed lanes illegally proceeding down the ramp of the Betsy Ross Bridge, away from New Jersey. Bigle and Visco made U-turns ahead of Officer Bragg, who proceeded behind them. Sergeant Schwarzl was on Richmond Street in her car when she saw the police pursue the Ross vehicle up the ramp of the Betsy Ross Bridge. She went up the ramp and turned off the road to the right. She saw the four vehicles pass her and proceeded to the I-95 ramp leading to south I95. With three patrol cars of Bigle, Visco and Bragg in pursuit, the young man abruptly applied his brakes before proceeding south on I-95. The right front of Officer Bigle's automobile struck the rear driver's side of the truck causing minimal damage. As a result of this impact, the Ross truck moved counter-clockwise on the ramp, and stopped facing

northbound on the southbound expressway. At about 9:29 PM (less than 3 1/2 minutes after the now stationary Ross vehicle was first spotted by Officer Bragg on Richmond Street), the Ross truck then moved on the shoulder of the road in a northbound direction on southbound I-95. At that moment, both defendant Sergeant Schwarzl and Lieutenant Richard Woertz, her supervisor who was following the pursuit on police radio, terminated the chase. Officer Christopher Morton, who was north of the scene, was ordered to proceed south on I-95 in the emergency lane at a slow pace. He entered 1-95 at the Princeton Avenue ramp (Cottman Avenue), with his emergency lights on at a speed of about 40 to 45 miles an hour. His purpose was to try to attempt to stop traffic; any apprehension of Ross was secondary. He stated that when the Ross vehicle passed him, he (Ross) was already in the left speed lane going north on southbound I-95. Ross proceeded in this wrong direction for a distance of 3.6 miles, covering the time period of three minutes and 26 seconds, before he crashed head-on at about 9:32 PM into a vehicle driven by the plaintiff, Marvin Thomas, who was severely injured. His passenger, plaintiff's decedent, Racquel Burnett, who was 23 years of age, was killed instantly, along with Joseph Ross and his passenger, Jennifer DePew.

In addition to this evidence, the plaintiffs presented two major experts; namely, Geoffrey Alpert, Ph.D., as well as Leonard Territo, Ph.D. both possessing doctorates in criminology. Dr. Territo also had a history of employment in law enforcement. Both reasoned that the general decision of the police (more particularly Sergeant Schwarzl) to pursue was improper. The risk to the public/police far outweighed any benefit of apprehension at that time. Both opined that

the police had violated several sections of the Philadelphia Police Department Directive 45 pertaining to Safe Operations of Police Vehicles in general, which contained specific provisions governing pursuits as well. Dr. Territo opined that since Ross was known to the police and was not a dangerous felon, apprehension easily could have occurred sometime later. Therefore, it was improper and contrary to the principles of Directive 45 to pursue him. Dr. Territo, in any event, maintained that as soon as Ross proceeded on the Betsy Ross Bridge ramp, the pursuit, which never should have occurred in the first place, should have been terminated at that time. Both experts further contended that it was also improper for the police to send Officer Morton in a southerly direction on I-95; that this order constituted continuation of the pursuit as well. Neither expert, however, testified that the actions of the police constituted an "intent to injure." It must be noted that, to the contrary, the defense experts pointed to a provision under the Pursuits Section of Directive 45 which gives the police authority to apprehend if sound police procedures are followed.

STANDARD OF PROOF

Before addressing this court's rationale in granting judgment notwithstanding the verdict, it is necessary to review the standard of proof which the plaintiff is obligated to overcome in civil rights cases arising from a police pursuit. All plaintiffs suggested at trial that the proper standard is whether there was deliberate indifference to public safety. To the contrary, the Supreme Court of the United States in *Lewis*, supra, concluded that the proper standard is "intent to harm." Thus, the trial court charged the jury and formulated

the liability questions pertaining to both Officer Bigle and then Lieutenant Schwarzl, thereby conforming with the *Lewis* standard. In *Lewis*, the Supreme Court affirmed the lower court's grant of summary judgment (reversing the Ninth Circuit) holding that plaintiff must show an intent to injure beyond the legitimate purpose of the arrest on the part of the police in order to recover. In *Lewis*, an 18 year old was speeding on a motorcycle with the 16 year old plaintiff's decedent as a passenger. He failed to heed to the police officer's attempts to pull the motorcycle over. Instead, he continued traveling for 75 seconds over a course of 1.3 miles in a residential neighborhood weaving in and out of oncoming traffic; forcing two cars and a bicycle to swerve off the road. The motorcycle and pursuing police car reached speeds up to 100 miles an hour. The chase ended after the motorcycle tipped over as the driver tried to make a sharp left turn. The patrol car struck the passenger, Lewis, after he was thrown from the vehicle during the turn, killing him. In order to resolve the conflict among certain circuits as to the standard of culpability of law enforcement officials arising from police pursuits stemming from violations of the Civil Rights Act, the Supreme Court granted certiorari reversing the Ninth Circuit's standard of deliberate indifference to/or a reckless disregard for a person's right to life and personal security. The Supreme Court's rationale for the use of this heightened standard of intent to harm, was based upon circumstances requiring quick action where there is no time to deliberate (e.g. such as police pursuit cases). The court reasoned, where unforseen circumstances arise in which the police must first determine whether to pursue and secondly employ subsequent courses of action during the chase, that such decisions must necessarily be

made in haste and under pressure. In these situations, the police must balance the competing interest of apprehension against safety to the general public. Since these types of chases are difficult in nature and made under pressure, bearing in mind that the cause of action involving an alleged violation of one's constitutional rights was not a negligence action, the element of fault necessary to impose liability must be a high one, namely, intent to harm. A lesser standard of deliberate indifference would apply, reasoned the court, where fast action was not necessary. Where the State's alleged misconduct injuring a party took place over an extended period of time, deliberate indifference only would apply to these types of civil rights actions. As examples of when this lesser standard would occur, the court cited long term mistreatment of prisoners of the state or of retarded individuals under the custody and care of a governmental entity. *Radecki v. Barela*, 146 F.3rd 1227 (10th Cir. 1998), construing the *Lewis* case supports this court's application of the intent to harm standard. In *Radecki*, an innocent bystander had been instructed by a Deputy Sheriff to assist him in subduing a suspect during a struggle for the possession of the Deputy's gun. The bystander, plaintiff's decedent, was fatally shot by the suspect after he gained possession of the gun. The Tenth Circuit applying the intent to harm standard, because quick action was needed to subdue the assailant, affirmed the lower court's grant of summary judgment.

JUDGMENT NOV

It is clear from a reading of these cases that the standard of culpability is intent to harm unrelated to the legitimate purpose of the arrest. That is to say, the plaintiff must prove

intent on the part of defendant Schwarzl to hurt the suspect, Ross, beyond mere apprehension of him, and that her actions arising from this mean intent caused the decedent's death. In applying this high standard to the facts of the case at bar, giving the plaintiff verdict winner every favorable inference, it becomes evident that plaintiff did not meet this standard of proof of culpability. Thus, Judgment NOV must be granted. The chase in this case, from the time Officer Bragg spotted Ross driving on Richmond Street to the time of the tragic accident, was less than six minutes. The police, at the order of both defendant Schwarzl and her superior, Lieutenant Woertz, terminated the chase when Ross voluntarily entered I-95 in the wrong direction, which occurred only 3 1/2 to less than 4 minutes after the pursuit began. The suspect then traveled, at his own volition, 3.6 miles for an additional period of approximately 3 minutes and 26 seconds before the crash. Under these circumstances, how can an evil intent to harm plaintiff beyond the legitimate purpose of the arrest be attributed to Sergeant Schwarzl?

Civil rights case law, where the cause of action stems from police pursuits, supports this court's position. The most recent Third Circuit case construing *Lewis* is *Davis v. Township of Hillside*, 190 F.3rd 167 (3rd Cir. 1999). The majority of the panel affirmed the grant of summary judgment under the following facts: (Judge McKee's concurring opinion indicated that these facts "could support" intent to harm if the police "gratuitously rammed" the suspect's car.) The police engaged in a chase of an individual suspected of theft of a vehicle at speeds of up to 70 miles an hour. The suspect's car went out of control after the pursuing police car had hit the fleeing automobile in the rear causing

the driver to strike his head on the steering wheel and become unconscious. The car then spun out of control and collided with two other cars; one of which was propelled into the plaintiff, who was standing on the sidewalk, severely injuring him. *Feist v. Simonson*, 222 F.3rd 455 (8th Cir. 2000), upon which the plaintiff heavily relied at trial in an attempt to convince this court to apply a lesser standard of deliberate indifference rather than intent to harm, supports this court's view that Judgment NOV is warranted as well. The Eighth Circuit affirmed the lower court's denial of summary judgment, applying deliberate indifference standard, but the police chase was outrageous and dissimilar to the instant facts. The pursuing police officer proceeded to chase the suspect for unauthorized use of motor vehicle at speeds of 97 to 104 miles per hour for 6 miles lasting 6 minutes. The final 1.2 miles of the chase were in the wrong direction on an interstate highway in which the officer continued to pursue the suspect. The pursuit ended in tragedy when the suspect's car struck the plaintiff's vehicle, killing him. In addition, the officer had a history of engaging in high-speed pursuits.

It must be noted that in light of *Lewis* and the pre *Lewis* case of *Fagan v. City of Vineland*, 22 F.3rd 1297 (3rd Cir. 1994) (en banc), as well as *Davis*, it is clear that our Third Circuit would never have used the deliberate indifference standard to civil rights police chases. *Fagan* applied the "shocks the conscience" standard to police pursuits prior to *Lewis*.

In any event, the facts in *Feist* are distinguishable from those of the instant case regardless of the standard applied. Unlike *Feist*, the police never pursued Ross in the wrong

direction on I-95 and were ordered to terminate the chase by Defendant Schwarzl and her superior when he entered the southbound lane proceeding north. Prior to termination of the chase on the I-95 southbound ramp, speeds never approached those in *Feist*. *Fagan* also supports the court's decision in this case. The Third Circuit affirmed the grant of summary judgment as to the police conduct in that civil rights police chase. It began with a speeding violation and ended after a lengthy police pursuit with an intersection collision into an innocent bystander's vehicle, killing three people and injuring others after the suspect had run a red light. The chase was much longer than here and had involved the running of many stop signs. The speeds were also greater. The suspect reached speeds of 70 to 80 miles an hour and the police pursued at 50 to 60 miles per hour. The grant of summary judgment, since it was pre *Lewis*, was based on a standard of "shocks the conscience", a lesser standard than that which the court is obligated to apply to the instant case.

In summary, the *Lewis*, *Davis*, *Feist* and *Faun* cases, which never reached a jury, involved police chases more egregious than this case. All involved greater speeds by the police. In *Davis*, the officer actually struck the suspect's car which precipitated the accident. Here, Ross of his own volition proceeded in the opposite direction on I-95; thereby causing the crash himself. In *Feist*, the officer actually followed the suspect for over a mile on the interstate in the wrong direction prior to the collision. The police did no such thing and terminated the pursuit when Ross went the wrong way on I-95. The *Fagan* pursuit was of greater length, at higher speeds and more time consuming.

Appendix B

The plaintiff argues that in analyzing whether the intent to harm culpability standard was met in this case, the actions of defendant Schwarzl participating in and orchestrating the search for Ross prior to the commencement of the pursuit must be considered. If added to the analysis of the facts, plaintiff asserts that there was sufficient evidence from which the jury could conclude that defendant Schwarzl was not simply doing her job, but was out "to settle a personal score with Ross and vindicate police honor." (See plaintiff's brief in opposition to defendant Schwarzl's motion for post trial relief, p. 17) To buttress this argument, plaintiff claims that the inordinate amount of police energy used to investigate and locate Ross is evidence of a malicious intent to do harm. It is submitted that the efforts to discover and locate Ross, although excessive, are not pertinent to this analysis and in any event do not change the fact that an intent to harm was not proved. This case must be viewed and analyzed solely from the standpoint of the chase. It is the chase itself which is important in determining intent to harm, rather than the cause of the chase. The fact that the police had been looking for Ross is not crucial. It is what occurred after Ross sighted Officer Bragg and decided to flee. At that point in time, Officer Bragg and subsequently other police had to act quickly without time to reflect. It is the time period beginning with the chase and ending with the accident, which is the only relevant aspect to the analysis. What difference does it make what the antecedent facts were which engendered the pursuit? It does not matter whether they were searching for Ross because he was suspected of stealing Officer Bigle's briefcase or whether, as in the cited cases, the police witnessed the probable cause to pursue; such as speeding or operating a stolen vehicle. The relevant time period began

when Officer Bragg witnessed Ross driving on Richmond Street and Ross' subsequent flight. There was a right to follow and pursue because the police had prior information that he was a suspect. This same right would have existed if Officer Bragg had no prior information about Ross but had seen him commit a traffic violation and then he began to flee.

The plaintiff would have this court believe that the police had no right to search for Ross because they knew he might flee. If this principle were valid, then no law enforcement official could ever search for a suspect for fear that it might culminate in a dangerous chase. *Lewis* holds otherwise. The United States Supreme Court recognized that pursuits are inherently dangerous but has permitted the police to pursue by balancing this right against protecting the public; absolving the police from liability in civil rights actions unless intent to harm is proven. The resources and manpower used to locate and apprehend Ross are not significant. They had this right. Even though they may not have expended this energy searching for a private citizen's stolen article does not, in itself, prove an intent to harm on their part.

The plaintiff further argues that there were certain violations of provisions of Directive 45, pertaining to Safe Operation of Police Vehicles and that these established an intent to harm. It must be noted that the court did charge the jury that if they found violations of this Directive, they could be considered in determining whether there was an intent to harm. The court emphasized, however, that a mere violation or violations did not in and of it or themselves establish an intent to harm. Plaintiff's counsel, through his experts, pointed to certain provisions which they maintained

constituted violations. They opined at trial that a pursuit should never have been undertaken since Ross was known to the police, not a dangerous felon and could have been arrested sometime later. They also stated that the pursuit on the Betsy Ross ramp violated the procedures under Directive 45 because too many vehicles were involved in the chase at too close a distance. They further contended that Officer Morton, who was dispatched to proceed in a southerly direction at the Princeton Avenue (Cottman Avenue) entrance, which was north of where Ross entered the I-95 highway, was also improper and constituted a second pursuit. The defense maintained at trial that a "catch all" provision of the Directive gives the police the right to pursue as long as sound procedures are followed. Even assuming there were violations of Directive 45, these experts never testified that these violations constituted an intent to harm. As to the provision requiring the police to cease searching for Ross and arrest him sometime later, assuming they followed this Directive, who is to say that he would not have fled and precipitated a pursuit at this future time. It made no difference as to how many police cars and at what distance they followed Ross onto the Betsy Ross ramp. It was he who made the decision to continue his flight and ultimately go in the wrong direction of I-95. In addition, it was undisputed that Officer Morton's purpose of proceeding in a northerly direction was to warn oncoming traffic of the danger from the Ross vehicle. Unfortunately, he did not have sufficient time to carry out his orders. In fact, he testified that when Ross passed him he was no longer on the shoulder of the highway but was proceeding in the left hand speed lane where the accident occurred moments later. Officer Morton's conduct, which

was proper and within the parameters of his assignment, also cannot be construed as contributory to prove intent to harm.

There is some suggestion in plaintiff's brief that the standard of culpability announced in *Lewis* may be "worsen legal plight," something less than intent to harm outside the legitimate purpose of the arrest. The following passage in *Lewis* is cited in support of this position:

> Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to *worsen their legal plight* (emphasis added) do not give rise to liability under the Fourteenth Amendment, redressible by an action under Sec. 1983. U.S. at 854, S.Ct. at 1720.

A careful reading of *Lewis*, as well as the subsequent Circuit Court cases cited in this opinion, in no way indicate that the phrase "worsen their legal plight" was meant to lessen the standard of culpability. This phrase is at best an explicatory phrase which was included to merely give the reader an additional understanding of the intent to harm standard[3].

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3. The defendant raised the defense of qualified immunity, first in a pretrial motion for summary judgment, which was denied by the Hon. John Milton Younge of this court in November, 2000, and then again in post trial motions. The grant of Judgment NOV renders this issue moot. Suffice it to say, this court agrees with Judge Younge that the defense is inapplicable to this case. The plaintiff has first identified the alleged deprivation of the constitutional right that was said to be violated here; which is the due process clause of the

(Cont'd)

Consequently, for the foregoing reasons, this court is constrained to grant Judgment NOV.

NONSUIT IN FAVOR OF THE CITY

The plaintiff has filed cross post trial motions taking exception and seeking removal of this court's grant of non-suit in favor of the City of Philadelphia. The non-suit was brought about when this court rejected certain evidence at a hearing outside the presence of the jury during the presentation of the plaintiff's case. Plaintiffs civil rights claim against the City was based upon the assertion that the deceased's civil rights were violated as a result of a long-term deliberate indifference to public safety exhibited by the police department in failing to enforce so-called violations of Directive 45 involving safe operation of police vehicles. There is no profound dispute between this court and parties as to the standard to be applied. It is whether the violations of the Directive constituted deliberate indifference to public safety; thereby causing a violation of the deceased's constitutional rights. *Fagan v. Cite of Vineland*, 22 F.3rd 1283 (3rd Cir. 1994). This lower standard is applicable because, unlike the pursuit situation, plaintiff asserted misconduct on the part of the police over a five year period. See *Lewis*, supra. This Directive was placed in effect by the Philadelphia Police Department on February 25, 1994. As stated, it pertains

(Cont'd)

14th Amendment. Secondly, the right allegedly implicated is harm arising from the police chase which clearly existed at the time of the incident. See *Lewis*, *Fagan* and *Feist*. Since plaintiff has met this two pronged test, the defense of qualified immunity does not apply.

generally to the safe operation of police vehicles, one section of which involves police pursuits.

The plaintiff's theory against the City, as it related to failure to enforce alleged violations of Directive 45, was based upon two sources of documentation; one from the Statistical Analysis Accident Reduction Unit Pursuits, another emanating from a 1993-1997 Summary involving police pursuits, both compiled by the Philadelphia Police Department. The court, at the hearing, prohibited the introduction of the information contained in these reports as too vague and not relevant to the proof of any long term violation of the Directive in question. The number of pursuits reflected in the reports over the five year time period in question amounted to 1,953 with 20% or 388 resulting in accidents. During the time period in question, there were nine deaths. It appears that six of these involved suspects and three were citizens. The documentation further indicated that there were 125 violations of Directive 45 by the police or only 6% violations in relation to the number of pursuits. From these 125 violations, the Summary indicated there were 12 formal disciplines. The percentage of formal disciplines resulting from violations was 9%. Plaintiff's expert, Dr. Torrito, after a review of these statistics, concluded in his report and would have testified at trial, if permitted, that there was an improper enforcement of this Directive leading to harm suffered by the deceased. This testimony was precluded as irrelevant and vague for several reasons. First, he never reviewed the facts of any of the 1,953 pursuits cited in the reports. The court reasoned that it was impossible for him to draw these conclusions without knowing the individual facts of each pursuit and the accidents stemming from these, or at least, have some

knowledge of what they entailed so as to be able to characterize these various pursuits and the accidents related to them. In addition, Dr. Torrito had no knowledge of the individual facts of the cited violations nor the circumstances resulting in formal discipline. It would be incomplete to formulate a conclusion of deliberate indifference to the decedent's constitutional rights without comparing the facts resulting in violations to those ending in formal discipline. Secondly, the statistics presented to the court on their face did not appear to be alarming. Only 388 of the 1,953 pursuits, or 20%, resulted in accidents. Of those, nine resulted in deaths over a five year period; six of which were suspects. In addition, 12 formal disciplines arising from 125 violations (about 9 1/2%) appeared to be within a normal range.

In the brief presented by plaintiff's counsel, there is extensive citation to material not contained in the court records. (See plaintiff's brief against the grant of non-suit pp. 12-13.) Since this material is not part of the record, it should not be considered. In any event, for the reasons stated, it would have no bearing on this court's grant of non-suit in favor of the City. Consequently, plaintiff's post trial motion requesting removal of the non-suit and a new trial against defendant City is denied.

DEFENDANT ROSS' RIGHT TO CONTRIBUTION

The defendant, Linda Lockwood, as Administratrix of the Estate of the suspect Joseph Ross, also filed post trial motions seeking contribution from the City of Philadelphia in negligence. The defendant's liability to the plaintiff was submitted to the jury and, of course, under the facts of this

case, the jury correctly found liability. The defendant does not contest this finding but sought to assert a right to contribution against the City. The court precluded the defendant from asserting this claim to the jury because no such right exists. The Supreme Court, in *Lindstrom v. Corry*, 763 A.2d 394 (PA 2000), held that the City was immune from liability in negligence to a suspect who was injured while fleeing apprehension or from resisting arrest by the police. If the City is immune from suit, how can the defendant possibly obtain contribution?

Also, from a practical point of view, no contribution issue should have been presented to the jury. The City tendered the full amount of liability of $500,000 under the statutory cap; thereby settling the negligence claims with the injured plaintiffs. The defendant's carrier tendered the full amount of insurance coverage of $30,000; the Ross estate is otherwise insolvent. Therefore, even if the City were not immune from liability to the Ross estate, the estate could not possibly obtain contribution under these circumstances, when it paid much less than the City. Consequently, post trial motions are denied.

PLAINTIFF'S OTHER CROSS-POST-TRIAL MOTIONS

The plaintiff, in cross post trial motions, had raised several issues challenging the court's rulings at trial. It is asserted that the court incorrectly charged the jury as to economic loss because it failed to instruct on the "total offset method" as annunciated in the case of *Kaczkowski v. Bolubasz*, 421 A.2d 1027 (1980). Plaintiff also takes issue with the fact that the court failed to charge on pre-impact fright. Although the grant of Judgment NOV renders these

issues moot, the court will discuss them in any event. The *Bolubasz* case is clearly the law as far as economic loss/future loss of earning capacity in Pennsylvania state causes of action. It has, nevertheless, been rejected by the U.S. Supreme Court, where the cause of action arises from Federal claims. *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 103A S.Ct. 2541 (1983); *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 108A S.Ct. 1837 (1988). The proper measure of damages under these cases was to discount the sums to present value; which plaintiff's economic expert was permitted to do at trial. The jury awarded the maximum amount under these calculations presented of $744,000. Therefore, there can be no complaint as to the amount awarded by the jury.

The plaintiff takes issue with this court's failure to charge on pre-impact fright. The court denied plaintiff's request for two reasons. First of all, there is no Pennsylvania case which permits pre-impact fright under the Survivor Death Act. The proper measure of damages would be pain and suffering following the accident until death. See *Nye v. PennDot*, 480 A.2d 318 (PA Super. 1984). Since the Plaintiff died instantly, there could be no recovery under this survival action category. Secondly, there was no admissible evidence presented concerning any pre-impact fright on the part of the deceased, Racquell Burnett. The plaintiff had offered at side-bar the alleged testimony of Margaret Baldino to prove this element of damages. She was a fourth plaintiff who was injured while proceeding south on I-95. She settled prior to trial. She allegedly would have testified about her own pre-impact fright. Since Ms. Baldino was in another automobile, her

testimony. is not relevant to any fright on the part of the deceased. Consequently, it was disallowed. In summary, this Court enters the appropriate orders pursuant to this opinion.[4]

BY THE COURT:

DATED: APRIL 4, 2001

s/ DiNubile, Jr.
DiNUBILE, JR., J.

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4. The Plaintiff has timely filed a petition for statutory attorneys fees and costs pursuant to a right granted to a verdict winner in a civil rights case. In light of the Court's decision granting judgment NOV, this petition is rendered moot at this time.

Appendix B

IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY CIVIL TRIAL DIVISION

NOVEMBER TERM, 1998

NO. 1847

MARVIN THOMAS & JACQUELINE SMITH, h/w and MARGARET BALDINO and DIANE P. DePEW, Individually and as Administratrix of the Estate of JENNIFER LYNN DePEW, her Daughter, Deceased, and RUBY GOODE-HENRY, Individually and as Administratrix of the Estate of RACQUEL R. BURNETT, her Daughter, Deceased

VS.

CITY OF PHILADELPHIA, OFFICER JAY BIGLE, SERGEANT JODI SCHWARZL, ET AL.

ORDER

AND NOW, this 4th day of April, 2001, the court enters the following Order.

Judgment NOV is entered in favor of defendant, Lieutenant Jodi Schwarzl, against the plaintiff, Ruby Goode-Henry, Administratrix of the Estate of Racquel R. Burnett, Dec'd.

Appendix B

All other Post Trial Motions are denied. Consequently, judgment of non-suit is entered in favor of the defendant, City of Philadelphia, and against the plaintiff, Ruby Goode-Henry, Administratrix of the Estate of Racquel R. Burnett, Dec'd., resulting from a grant of compulsory non-suit at trial. Judgment is entered on the jury verdict in favor of defendant, Officer Jay Bigle, and against plaintiff, Ruby Good-Henry, Administratrix of the Estate of Racquel R. Burnett, Dec'd. Judgment is entered on the jury verdict in favor of plaintiff, Ruby Goode-Henry, Administratrix of the Estate of Racquel R. Burnett, Dec'd., and against defendant, Linda Lockwood, Administratrix of the Estate of Joseph Ross, Dec'd., in the amount of $744,000.

BY THE COURT:

s/ DiNubile, Jr.
DiNUBILE, JR., J.

APPENDIX C — ORDER OF THE SUPREME COURT OF PENNSYLVANIA FOR THE EASTERN DISTRICT DENYING PETITION FOR ALLOWANCE OF APPEAL DATED DECEMBER 17, 2002

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

No. 372 EAL 2002

MARVIN THOMAS AND JACQUELINE SMITH, HIS WIFE AND MARGARET BALDINO AND DIANE DEPEW, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JENNIFER DEPEW, HER DAUGHTER, DECEASED AND RUBY GOODE-HENRY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RACQUEL, R. BURNETT, HER DAUGHTER, DECEASED

v.

THE CITY OF PHILADELPHIA AND OFFICER JAY BIGLE, SGT. JODI SCHWARZL AND LINDA LOCKWOOD, AS ADMINISTRATRIX OF THE ESTATE OF JOSEPH ROSS

APPEAL OF: RUBY GOODE-HENRY, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF RACQUEL R. BURNETT, HER DAUGHTER, DECEASED

Petition for Allowance of Appeal from the
Order of the Commonwealth Court

Appendix C

ORDER

PER CURIAM

AND NOW, this 17th day of December 2002, the Petition for Allowance of Appeal is hereby **DENIED.**

APPENDIX D — EXCERPTS OF TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 15, 2000

IN THE COURT OF COMMON PLEAS
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CIVIL TRIAL DIVISION

NOVEMBER TERM, 1998

NO 1847

MARVIN THOMAS & JACQUELINE SMITH H/W AND MARGARET BALDINO AND DIANE P. DEPEW, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF JENNIFER LYNN DEPEW, HER DAUGHTER, DECEASED, AND RUBY GOODE-HENRY, INDIVIDUALLY, AND AS ADMINISTRATRIX OF THE ESTATE OF RACQUEL R. BURNETT, HER DAUGHTER, DECEASED, AND LINDA LOCKWOOD, ADMINISTRATRIX OF THE ESTATE OF JOSEPH ROSS

VS.

CITY OF PHILADELPHIA &
POLICE OFFICER JAY BIGLE

December 15, 2000

VOLUME IX

Courtroom 253, City Hall
Philadelphia, Pennsylvania

Appendix D

Before: Honorable Victor J. Di Nubile, J.
and a Jury

* * *

[35] (At 12:40 p.m. the following transpired in open court in the presence of the jury:)

Court Crier: Ladies and gentlemen of the jury, have you reached a verdict?

Foreperson: Yes, We have.

Court Crier: At least 10 of 12 have agreed on a verdict?

Foreperson: Yes.

The Court: Did Officer Bigle violate the Civil Rights Act in that his conduct constituted an intent to harm unrelated to the legitimate object of the arrest?

Foreperson: No.

The Court: Then you skip question two. You go to question three.

Did Lieutenant Schwarzl violate the Civil Rights Act in that her conduct constituted an intent to harm unrelated to the legitimate object of the arrest?

Foreperson: Yes.

Appendix D

The Court: Then we go to [36] question four.

Was the Civil Rights Violation of Lieutenant Schwarzl a substantial factor in bringing about any harm to the deceased, Raquel Burnett.

Foreperson: Yes.

The Court: Then you go to the damage question.

State the amount of damages, if any, sustained by Miss Burnett's Estate caused by the defendant or defendant's liability under the Civil Rights Act for Loss of Future Earning Capacity.

Foreperson: $744,000.

The Court: Then we proceed to the next sheet.

Were the actions of Joseph Ross a substantial factor in causing harm to the deceased, Raquel Burnett?

Foreperson: Yes.

The Court: Then you weren't required to answer that other question. Okay.

Does anyone wish the jury to be

* * * *